B. Jeannie Fry
Director-Federal Regulatory

SBC Telecommunications, Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
Phone 202 326-8894
Fax 202 408-4806

ORIGINAL

EX PARTE OR LATE FILED

September 8, 1999

Ex Parte

Ms. Magalie R. Salas
Secretary
Federal Communication Commission
Room TW-A325, The Portals
445 Twelfth Street
Washington, D.C. 20554

Re: Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, CC Docket No. 98-122

Dear Ms. Salas:

In accordance with the Commission's rules, please be advised that on September 7, 1999, Mr. Mike Zpevak, Mr. Geof Klineberg and the undersigned, representing SBC Communications Inc. (SBC) met in three separate meetings with the following:

- Mr. Bill Bailey, Interim Legal Advisor to Commissioner Furchtgott-Roth;
- Ms. Margaret Egler and Ms. Jodie Donovan-May of the Office of Plans and Policy (OPP):
- Mr. Chris Wright, General Counsel of the Commission, Mr. James Carr and Ms. Aliza Katz. from the Office of General Council (OGC).

The purpose of the meeting was to present SBC's position on the petition filed by the group collectively known as "the Missouri Municipals" seeking an order from the Commission to preempt Section 392.410(7) of the Revised Statutes of Missouri ("HB 620"). On July 8, 1998, the Missouri Municipals filed the petition for preemption of the above statute, which prohibits the Municipals from providing telecommunications services or facilities. SBC asks the FCC to deny the Municipals' petition on the grounds that the Commission has already ruled and the DC circuit has upheld, in the case of the City of Abilene v. FCC, that municipalities cannot provide telecommunications services or facilities. Furthermore, the Municipals' argument that they should be distinguished from the City of Abilene based on their reasoning that they are municipally owned public utilities rather than a municipality itself cannot succeed.

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Attached is a copy of the presentation materials distributed at this meeting.

An original and one copy of this letter and the attachments are being submitted. Acknowledgement and date of receipt of this transmittal are requested. A duplicate transmittal letter is attached for this purpose.

Please include this letter in the record of these proceedings in accordance with Section 1.1206(a)(2) of the Commission's Rules.

If you have any questions on this, please do not hesitate to contact me at 202-326-8894.

Sincerely,

CC: Mr. Christopher Wright*
Mr. James Carr*
Ms. Aliza Katz*
Mr. Bill Bailey*
Ms. Jody Donovan-May*
Ms. Margaret Egler*
Mr. James Baller

Attachments

* Provided a copy of the transmittal letter only.

MISSOURI'S PROHIBITION ON MUNICIPAL PROVISION OF TELECOMMUNICATIONS SERVICES DOES NOT VIOLATE 47 U.S.C. § 253

CC Docket No. 98-122
September 7, 1999

HB 620 — Mo. Rev. Stat. § 392.410(7) (1997) — provides as follows:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

(1) For its own use;
(2) For 911, E-911 or other emergency services;
(3) For medical or educational purposes;
(4) To students by an educational institution; or
(5) Internet type services.

The provisions of this subsection shall expire on August 28, 2002.

47 U.S.C. § 253(a) provides as follows: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

- **THIS CASE IS CONTROLLED BY THE HOLDING OF CITY OF ABILENE.**
- **EFFORTS TO DISTINGUISH CITY OF ABILENE CANNOT SUCCEED.**
  - **A state's regulation of its municipally owned utilities implicates the sovereignty interests recognized in Gregory v. Ashcroft, 501 U.S. 452 (1991).**
    - Under Missouri Law, a municipally owned utility is indistinguishable from the municipality itself.
  - **Nothing in the language of section 253(a) "compels" the conclusion that Congress intended to govern the relationship between states and municipally owned utilities.**
    - The text of section 253(a) contains no clear and unmistakable language.
    - Legislative history alone is insufficient to overcome Gregory's presumption.
    - In any case, the legislative history does not support preemption in this case.
- **HB 620 IS A LIMITED, REASONABLE LEGISLATIVE RESPONSE TO A PERCEIVED CONFLICT OF INTEREST.**

Missouri Competition Numbers

(as of 7/31/99)

Estimated lines served by CLECs 170,535
(includes 64,474 resold lines)

Percentage of business lines lost to competitors 17%
(based on estimated lines lost number used above)

Companies certified by PSC to compete 58

Certified companies with approved interconnection/resale agreements and approved tariffs 44
(These companies could compete today if they wanted to)

Companies actively passing orders 31

Number of interconnection/resale agreements signed by SWBT 79
(113 under negotiation)

MISSOURI'S PROHIBITION ON MUNICIPAL PROVISION OF TELECOMMUNICATIONS SERVICES DOES NOT VIOLATE 47 U.S.C. § 253

CC Docket No. 98-122
September 1999

Currently pending before the Commission is a petition filed by the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities seeking an order that House Bill 620, codified in section 392.410(7) of the Revised Statutes of Missouri ("HB 620"), is preempted by section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253. HB 620 prohibits Missouri municipalities from offering telecommunications services to the public either directly or indirectly by leasing its facilities to a telecommunications provider.

HB 620 — Mo. Rev. Stat. § 392.410(7) — provides as follows:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
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> (1) For its own use;
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> (3) For medical or educational purposes;
> (4) To students by an educational institution; or
> (5) Internet type services.
>
> The provisions of this subsection shall expire on August 28, 2002.

In a virtually identical challenge to a provision of Texas law, the Commission concluded in 1997 that a municipality is not an "entity" separate and apart from the State for purposes of applying section 253(a) and that preempting the enforcement of a law like this one would "insert this Commission into the relationship between the state . . . and its political subdivisions in a manner that was not intended by section 253."[1] Earlier this year, the D.C. Circuit affirmed the Commission's conclusion in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (**TAB A**). The only issue that remains to be decided after *City of Abilene* is whether a State may limit the

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[1] Memorandum Opinion and Order, *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3467 [¶ 16] (1997) ("*Texas Order*"), *petition for review denied, City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

ability of so-called "municipally owned utilities" in the same manner that they may regulate municipalities themselves. The answer is clearly "yes."

I. THIS CASE IS CONTROLLED BY THE HOLDING OF *CITY OF ABILENE.*

In the *City of Abilene*, the D.C. Circuit recognized that interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty. Local governmental units within a State have long been treated as mere "convenient agencies" for exercising State powers. And the relationship between a State and its municipalities, including what limits a State places on the powers it delegates, is within the State's absolute discretion. 124 F.3d at 52.

The court also recognized that the text of section 253(a) is admittedly broad: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). But it is not enough that the word "entity" in section 253(a) could bear the meaning of municipality. Relying on the Supreme Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (**TAB B**), the D.C. Circuit concluded that federal law may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.

"Like the Commission, we therefore must be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services. This level of confidence may arise, *Gregory* instructs us, only when Congress has manifested its intention with *unmistakable clarity*. . . . Section 253(a) fails this test." *City of Abilene*, 164 F.3d at 52 (emphasis added; citation and footnote omitted).

II. EFFORTS TO DISTINGUISH *CITY OF ABILENE* CANNOT SUCCEED.

If the petitioners are going to succeed in distinguishing *City of Abilene*, they will have to show either (1) that a state's regulation of its municipally owned utilities does not implicate the sovereignty interests recognized in *Gregory*; or (2) that the language of section 253(a) "compels" the conclusion that Congress intended to govern the relationship between states and municipally owned utilities. As demonstrated below, *City of Abilene* simply cannot be distinguished on either ground.

A. Under Missouri Law, a Municipally Owned Utility is Indistinguishable From the Municipality Itself.

It is well settled under Missouri law that publicly owned utilities are run by the municipality's city council. *See, e.g., Glidewell v. Hughey*, 314 S.W.2d 749, 754-55 (Mo. banc

1958) (**TAB C**) ("these utilities and the employees engaged therein are clearly subject to and regulated by the exercise of the legislative powers of the City. Not only does the City Council have the final decision on the utilities budget, rates and disbursements but the Board may even be abolished and its facilities, powers and duties transferred to a department either then existing or to be established by the City Council. . . . [T]he Board is only an administrative body or department of the City Government, with certain legislative powers delegated to it by the Charter with reference to employees (as hereinafter shown) and with its members being part of the legislative department of the City for certain purposes."); *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 352-53 (Mo. 1951) (**TAB D**) ("Where the utility is municipally owned, the legislative function of fixing rates is in the municipality to be in no way affected by any regulation except the will of its own citizens. Generally the appropriate legislative officers of the municipality fix the rates and change them from time to time as the operation of the utility may require. The Board of Public Utilities of the City of Springfield presently has the power to fix rates subject to the approval of the City Council. After the City of Springfield acquired the Springfield utilities, the City Council fixed the rates until the creation of City's Board of Public Utilities, April 1, 1946.") (internal quotation marks and citations omitted).

When boards are created to operate municipally owned utilities, these boards are not separate entities. They are merely part of the city government, like the mayor and the fire department. *See, e.g., North Kansas City Hosp. Bd. of Trustees v. St. Lukes Northland Hosp.*, 984 S.W.2d 113, 117 & n.2 (Mo. Ct. App. 1998) (**TAB E**) (holding that a board created to run a hospital was merely a part of the city government, like a board created to operate municipally owned utilities), citing *State ex rel. Board of Trustees of the City of North Kansas City Mem. Hosp. v. Russell*, 843 S.W.2d 353, 357 (Mo. banc 1992) (**TAB F**). The Missouri Constitution explicitly prohibits a city from delegating its municipal authority to own and operate a utility to any private entity. *See* Missouri Const., art. VI, § 23 (**TAB G**) ("No . . . city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association, or individual, except as provided in this constitution.").

Missouri municipalities have regularly argued in other contexts that municipally owned utilities are indistinguishable from the cities themselves. *City of Springfield v. Fredricks*, 630 S.W.2d 574, 575 (Mo. 1982) (**TAB H**) (deciding that municipally owned utilities are exempt under Missouri Const., art. X, § 6, which provides that "[a]ll property, real and personal, of the state, counties and other political subdivisions, . . . shall be exempt from taxation") (internal quotation marks omitted). Moreover, employees of municipally owned utilities, like the municipality's other public employees, may not bargain collectively. *Glidewell*, 314 S.W.2d at 756 (**TAB C**) (the Missouri Constitution "does not confer any collective bargaining rights upon public officers or employees in their relations with municipal government. . . . [T]here is no such separation of public utilities of the City from its general governmental functions and legislative powers as would be required to make [the constitutional provision] applicable. Therefore, our

conclusion is that under the present Charter of the City the whole matter of qualifications, tenure, compensation and working conditions in the City's public utilities involves the exercise of legislative powers and cannot become a matter of bargaining and contract."); *Strunk v. Hahn*, 797 S.W.2d 536, 540 (Mo. Ct. App. 1990) (**TAB I**); *Sumpter v. City of Moberly*, 645 S.W.2d 359, 361 (Mo. banc 1982) (**TAB J**).

The distinction between municipally owned and investor-owned utilities in Missouri is not a mere formality. When borrowing money, publicly owned utilities can negotiate lower rates because they can "'take advantage of the combined purchasing power of the City as a whole wherever practicable.'" *Glidewell*, 314 S.W.2d at 754 (**TAB C**) (quoting section 16.12 of the Springfield City Charter). Municipally owned utilities do not pay franchise taxes; instead, they may make voluntary payments to the city. *Pace v. City of Hannibal*, 680 S.W.2d 944, 945 (Mo. banc 1984) (**TAB K**) ("The board, from the inception of the utility operation, has paid annually a percentage of its gross receipts into the general revenue fund of the city. These payments are said to be made 'in lieu of a franchise tax,' such as is ordinarily levied upon investor-owned utilities. Our attention has not been directed to anything in the charter, statutes or ordinances which mandates such payments by the board. So far as the record shows, the payments are voluntary on the part of the board, and the board could reduce or eliminate them if so disposed.") (footnote omitted). Municipalities are empowered under state law (either directly or through approved municipal charters) to provide for the creation or expansion of municipally owned utilities by issuing tax-free municipal bonds. *See, e.g.*, Mo. Rev. Stat. § 91.450 (**TAB L**).

Municipally owned utilities are regulated differently from investor-owned utilities. For example, Missouri Public Service Commission does not have jurisdiction to regulate the rates of municipally owned utilities. *See Love 1979 Partners v. Public Serv. Comm'n of Missouri*, 715 S.W.2d 482, 489 (Mo. banc 1986) (**TAB M**) ("The legislature, in its wisdom, has given the Commission jurisdiction only over investor-owned utilities . . . . The Commission does not regulate rates of municipally-owned utilities and rural cooperative associations."); *Forest City v. City of Oregon*, 569 S.W.2d 330, 333 (Mo. Ct. App. 1978) (**TAB N**) (holding that Missouri Public Service Commission does not have jurisdiction to review or regulate the water rates charged by one city's utility to another city); *State ex rel. City of Springfield v. Public Service Commission of the State of Missouri*, 812 S.W.2d 827, 830 (Mo. Ct. App. 1991) (**TAB O**); *Shepherd v. City of Wentzville*, 645 S.W.2d 130, 133 (Mo. Ct. App. 1982) (**TAB P**).

Although they may sometimes perform proprietary-like functions, Missouri courts have refused to apply the governmental/proprietary functions distinction outside the context of municipal tort liability. *State ex rel. Board of Utils. v. Crow*, 592 S.W.2d 285, 288 (Mo. Ct. App. 1979) (**TAB Q**) ("By virtue of §§ 16.6 and 16.7 of the Springfield City Charter, [the members of the Board] hold all the public utilities of the city in trust for the citizens of Springfield and operate those utilities for their benefit. [The Board's] emphasis on the distinction between 'governmental' and 'proprietary' activities is important in tort cases, but

here it has no significance."); *Missouri Municipal League v. State*, 932 S.W.2d 400, 402-403 (Mo. 1996) (**TAB R**) ("the distinction between governmental and proprietary functions has little, if any, application outside of the tort liability of municipalities") (internal quotation marks omitted); *Loving v. City of St. Joseph*, 753 S.W.2d 49, 51 (Mo. Ct. App. 1988) (**TAB S**) (holding that, even though providing municipal tennis courts was a proprietary act, organization that ran the tennis courts was a mere instrumentality of the city); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 890 (Mo. 1960) (**TAB T**) ("the distinction between governmental and proprietary functions . . . has proved useful to restrain the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities which government today pursues to meet the needs of the citizens"); *City of Springfield v. Clouse*, 206 S.W.2d 539, 546 (Mo. banc 1947) (**TAB U**) (refusing to draw a line between municipal employees performing governmental and proprietary functions in determining whether the latter may bargain collectively).

B. Nothing in Either the Language or the Legislative History of Section 253(a) Makes "Unmistakable" Congress's Intention to Interfere with a State's Regulation of Its Municipally Owned Utilities.

1. The Text of Section 253(a) Contains No Clear and Unmistakable Language.

There is no dispute that the word "entity" is not defined anywhere in the Communications Act. Furthermore, the D.C. Circuit in *City of Abilene* has already found that the words "any" and "entity" together are insufficient to overcome the presumption of *Gregory*: Although it is "linguistically possible" to include a municipally owned utility under the heading "entity,"

> it is not enough that the statute could bear this meaning. If it were, *Gregory*'s rule of construction would never be needed. *Gregory*'s requirement of a plain statement comes into play only when the federal statute is susceptible of a construction that intrudes on State sovereignty. Other than the possibility just mentioned, Abilene offers nothing else, and certainly no textual evidence, to suggest that in using the word 'entity,' Congress deliberated over the effect this would have on State-local government relationships or that it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business.

City of Abilene, 164 F.3d at 52-53 (**TAB A**).

2. Legislative History Alone is Insufficient to Overcome *Gregory*'s Presumption.

Gregory requires a "plain statement" in the text itself — "it must be plain to anyone *reading the Act* that it covers judges." 501 U.S. at 467 (**TAB B**) (emphasis added). And *City of Abilene* holds that federal law may not be interpreted to intrude into areas of state sovereignty "unless *the language of the federal law* compels the intrusion." *City of Abilene*, 164 F.3d at 52 (**TAB A**).

In the context of the Eleventh Amendment — which implicates the same state-sovereignty concerns as protected by *Gregory* — the Supreme Court expressly rejected the role of legislative history in satisfying the need for a "plain statement" when such a statement cannot be found in the text itself:

> Respondent also contends that in enacting the Rehabilitation Act, Congress abrogated the States' constitutional immunity. In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (citation omitted) (**TAB V**).

3. In Any Case, the Legislative History Does Not Support Preemption in This Case.

Petitioners purport to find comfort in the Conference Report's statement that "explicit prohibitions on entry by a utility into telecommunications are preempted under [section 253]." S. Conf. Rep. 104-230, at 127 (**TAB W**). But this discussion of "utilities" was intended simply to ensure that States would not, under the guise of protecting captive ratepayers — or, in the words of section 253(b), by invoking their authority to impose "requirements necessary to . . . safeguard the rights of consumers" — prohibit utilities from entering telecommunications markets. Nothing in this passage of the Conference Report suggests that the conferees were even thinking about *publicly owned* utilities, let alone making it unmistakable that a State may not decide for itself how to eliminate the potential conflict of interest when a municipality assumes the dual roles of regulator and competing provider of local telecommunications services.

Petitioners' efforts to rely on post-enactment letters from Members of Congress is equally unavailing. It is well established that isolated, post-enactment statements, to the extent they are legislative *history*, carry little weight. *Landgraf v. USI Film Products*, 511 U.S. 244, 262, 262-63 n.15 (1994); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) ("'Subsequent legislative history'" — which presumably means the post-enactment history of a statute's consideration and enactment — is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions not of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law previously enacted means.").

III. HB 620 IS A LIMITED, REASONABLE LEGISLATIVE RESPONSE TO A PERCEIVED CONFLICT OF INTEREST.

Municipalities in Missouri regulate private telecommunications providers in a variety of ways: they control access to public rights-of-way; they regularly obtain access to commercially sensitive information; and they impose various taxes on gross receipts. If these municipalities were also in the business of competing with these private companies in the provision of telecommunications services, a serious conflict of interest would arise. In 1997, the Missouri General Assembly decided that it would avoid this conflict of interest by prohibiting, with some exceptions, its own political subdivisions from competing with private companies in the market for telecommunications services.

Instead of prohibiting political subdivisions of the State from providing *any* telecommunications service, HB 620 permits municipalities to provide a range of services that are arguably appropriate for a public agency. For example, a municipality is free to provide such services for its own use, for emergency services, and for medical or educational purposes. Moreover, the statute sunsets in three years, requiring the Missouri General Assembly to revisit its policy judgment at that time. In contrast, section 3.251(d) of Texas' PURA95 (**TAB X**),[2] which was upheld by the Commission in the *Texas Order* and by the D.C. Circuit in *City of Abilene*, was an absolute prohibition on any municipal entry into the telecommunications business. In the *Texas Order*, this Commission encouraged States to avoid imposing "*absolute prohibitions* on municipal entry into telecommunications" and urged instead the adoption of "measures that are much less restrictive that an outright ban on entry." *Texas Order*, 13 FCC Rcd at 3549 [¶ 190] (emphasis added). This is precisely what the Missouri General Assembly did when it enacted HB 620.

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[2] In 1997, PURA95 was recodified into the Texas Utilities Code. Section 3.251(d) of PURA95 can now be found at Tex. Util. Code Ann. §§ 54.201-.202 (West 1999).

INDEX TO APPENDIX

TAB

164 F.3d 49 printed in FULL format.

CITY OF ABILENE, TEXAS, ET AL., PETITIONERS v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS; STATE OF TEXAS, ET AL., INTERVENORS

No. 97-1633, Consolidated with No. 97-1634

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

164 F.3d 49; 1999 U.S. App. LEXIS 26; 14 Comm. Reg. (P & F) 655

November 2, 1998, Argued

January 5, 1999, Decided

PRIOR HISTORY: On Petitions for Review of an Order of the Federal Communications Commission.

DISPOSITION: Petition for judicial review denied.

CORE TERMS: entity, telecommunications, municipality, regulation, sovereignty, telephone, provider, interstate, Texas Utility Act, preempted, legal requirement, federal law, Telecommunications Act, reasonable compensation, judicial review, federal agency, local statute, public safety, partnership, petitioned, territory, safeguard, intrusion, sovereign, clarity, intrude, speaker, notice, manage, local government

COUNSEL: James Baller argued the cause for petitioner. With him on the briefs were Sean Stokes and Lana Meller.

James M. Carr, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Joel I. Klein, Assistant Attorney General, U.S. Department of Justice, Catherine G. O'Sullivan and Andrea Limmer, Attorneys, Christopher J. Wright, General Counsel, Federal Communications Commission, Daniel M. Armstrong, Associate General Counsel, and John E. Ingle, Deputy Associate General Counsel.

James D. Ellis, Patricia Diaz Dennis, David F. Brown, Michael K. Kellogg, Geoffrey M. Klineberg, Durward D. Dupre and Michael J. Zpevak were on the brief for intervenor Southwestern Bell Telephone Company. Robert M. Lynch entered an appearance.

Elizabeth R. Sterling, Assistant Attorney General, was on the brief for intervenor State of Texas. Jeffrey L. Sheldon and Sean A. Stokes were on the briefs for intervenor UTC, The Telecommunications Association.

JUDGES: Before: RANDOLPH, ROGERS, and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge RANDOLPH.

OPINIONBY: RANDOLPH

OPINION: [*50] RANDOLPH, Circuit Judge: The State of Texas has a law prohibiting its municipalities from providing telecommunications services. The United States has a law against state statutes that bar "any entity" from this line of business. If a Texas municipality is "any entity," the Supremacy Clause, U.S. CONST. art. VI, cl. 2, would render the Texas law a nullity, or so it is claimed. In legal parlance, the federal law would "preempt" the state law. The question here is whether the Federal Communications Commission, which administers the federal law, rightly decided that the Texas law is not preempted.

The west-central Texas city of Abilene, population 106,000, convened a task force to [*51] study the city's technological "needs." The task force believed Abilene's businesses and residents should have "two-way audio, video and data transmission capabilities." According to the city, the local exchange company is unwilling to upgrade its system for this purpose. The city wants to fill the gap, or at least wants to consider doing so. A Texas statute stands in the way. It requires those seeking to provide local exchange telephone service, basic local telecommunications service, or switched access service to obtain a particular type of certificate. See Texas Public Utility Regulatory Act of 1995 § 3.251(c) (codified at TEX. UTIL. CODE ANN. §§ 54.001, 54.201-

.202 (West 1998) ("Texas Utility Act"). n1 This 1995 Texas law also renders municipalities ineligible for the certificates and forbids them from selling, "directly or indirectly," telecommunications services to the public. Id. § 3.251(d).

n1 Until 1997, these portions of the Texas Utility Act were codified at TEX. REV. CIV. STAT. ANN. art. 1446c-0 (West Supp. 1996).

Thwarted on the State front, the city of Abilene turned to the Federal Communications Commission. The city petitioned for a declaratory ruling that a provision in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preempted the Texas law. The provision-- § 253(a)--is as follows: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *47 U.S.C. § 253*(a). n2 The Commission denied the petition on the ground that Congress, in using the word "entity" in § 253(a), had not expressed itself with sufficient clarity to warrant federal interference with a State's regulation of its political subdivisions. See In re: *Public Util. Comm'n of Texas, 13 FCC Rcd 3460, 3547 (1997)*. The city, joined by the American Public Power Association, petitioned for judicial review. Other parties intervened for and against the city's position.

n2 In its entirety, § 253 provides:

(a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) If, after notice and opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This section shall not apply-

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

In deciding this case we shall assume arguendo that Congress, acting within its constitutional authority, may--through the Supremacy Clause--supersede a State law limiting the powers of the State's political subdivisions. We put the matter in terms of limiting a municipality's powers because in Texas "home rule" cities like the city of Abilene, although deriving their powers from the state constitution, are subject to state legislative restrictions on those powers. See TEX. CONST. art. XI, § 5; see also *Lower Colorado River Auth. v. City of San Marcos, 523 S.W.2d 641, 643-44 (Tex. 1975);* [*52] *Zachry v. City of San Antonio, 296 S.W.2d 299, 301 (Tex. Civ. App. 1956),* aff'd, *157 Tex. 551, 305 S.W.2d 558 (Tex. 1957)*. Whatever the scope of congressional authority in this regard, interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty. Local governmental units within a State have long been treated as mere "convenient agencies" for exercising State powers. See *Sailors v. Board of Educ., 387 U.S. 105, 107-08, 18 L. Ed. 2d 650, 87 S. Ct. 1549 (1967);* see also *Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 607-08, 115 L. Ed. 2d 532, 111 S. Ct. 2476 (1991)*. And the relation-

ship between a State and its municipalities, including what limits a State places on the powers it delegates, has been described as within the State's "absolute discretion." *Sailors, 387 U.S. at 107-08.*

For these reasons, we are in full agreement with the Federal Communications Commission that § 253(a) must be construed in compliance with the precepts laid down in *Gregory v. Ashcroft, 501 U.S. 452, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991).* To claim, as the city of Abilene does, that § 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that Congress altered the State's governmental structure. Gregory held that courts should not simply infer this sort of congressional intrusion: "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *501 U.S. at 461.* Like the Commission, we therefore must be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services. This level of confidence may arise, Gregory instructs us, only when Congress has manifested its intention with unmistakable clarity. See *501 U.S. at 460.* Federal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion. n3

n3 We made a similar point in Commonwealth of Virginia v. EPA when we wrote that a court "would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes." *323 U.S. App. D.C. 368, 108 F.3d 1397, 1410 (D.C. Cir. 1997),* partial reh'g granted, *325 U.S. App. D.C. 155, 116 F.3d 499 (D.C. Cir. 1997).*

Section 253(a) fails this test. The first thing one notices about the provision is the oddity of its formulation. It invalidates State laws that "prohibit" an entity's "ability" to do something, namely, to provide telecommunications services. This sounds strange because one would not have supposed that an entity's "ability" to furnish these services turned on a State's permission. That aside, the question remains whether the category of those whose "ability" may not be impinged by State law--"any entity"--includes municipalities. To place municipalities in that category would be to protect them from State laws restricting their governmental activities. In contending that § 253(a) has this effect, Abilene thinks it important that the provision places the modifier "any" before the word "entity." If we were dealing with the spoken word, the point might have some significance, or it might not, depending on the speaker's tone of voice. A speaker, by heavily emphasizing the "any" in "any entity," might be able to convey to his audience an intention to include every conceivable thing within the category of "entity." But we are dealing with the written word and we have no way of knowing what intonation Congress wanted readers to use. All we know is that "entity" is a term Congress left undefined in the Telecommunications Act. n4 The term may include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, an association. See *Alarm Indus. Communications Comm. v. FCC, 327 U.S. App. D.C. 412, 131 F.3d 1066 (D.C. Cir. 1997).* Abilene maintains that it is also linguistically possible to include a municipality under the heading "entity." n5 But it is not [*53] enough that the statute could bear this meaning. If it were, Gregory's rule of construction would never be needed. Gregory's requirement of a plain statement comes into play only when the federal statute is susceptible of a construction that intrudes on State sovereignty. Other than the possibility just mentioned, Abilene offers nothing else, and certainly no textual evidence, to suggest that in using the word "entity," Congress deliberated over the effect this would have on State-local government relationships or that it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business.

n4 Abilene cites only sections of the Telecommunications Act defining terms other than "entity." See Petitioners' Brief at 31.

n5 But see *Sailors, 387 U.S. at 107* (quoting *Reynolds v. Sims, 377 U.S. 533, 575, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)):* "Political subdivisions of States--counties, cities or whatever--never were and never have been considered as sovereign entities."

Abilene points out that § 253 contains two other subsections explicitly restricting the scope of preemption and preserving State regulatory authority over telecommunications services. See *47 U.S.C. § 253*(b), (c). From this, it draws the conclusion that Congress meant to reserve to the States only very narrow powers. We think the opposite conclusion follows. The two subsections-- § 253(b) and (c)--set aside a large regulatory territory for State authority. States may act to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, safeguard the rights of consumers, manage the public rights-of-way, and require fair and reasonable compensation from telecom-

munications providers for use of public rights-of-way. See *47 U.S.C. § 253*(b), (c). In any event, the fact that Congress, in other parts of § 253, expressly reserved certain powers to the States does not make § 253(a) into the sort of clear expression Gregory requires for congressional interference with a State's regulation of its political subdivisions.

Abilene tells us that Congress "would surely have inserted the word 'private' between 'any' and 'entity' in Section 253(a)" if it had not wanted to limit the power of States over their local units. Petitioners' Brief at 32. The argument is mistaken. Any statute failing the Gregory standard, that is, any statute not clearly including matters within the core of State sovereignty, could be rewritten to exclude those matters. The question Gregory addresses is what to do when the text fails to indicate whether Congress focused on the effect on State sovereignty. Gregory's answer is--do not construe the statute to reach so far. n6

n6 In deciding whether the Age Discrimination in Employment Act of 1967 ("ADEA") preempted a Missouri law requiring certain judges to retire at age seventy, Gregory made the point this way: "in this case we are not looking for a plain statement that judges are excluded [from the ADEA's coverage]. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included." *501 U.S. at 467.*

Abilene cites two previous Commission decisions as if these could alter the analysis Gregory demands. n7 In re: *IT&E Overseas, Inc., 7 FCC Rcd 4023 (1992),* did not concern federal preemption of traditional state powers. It involved an attempt by Guam, a U.S. territory, to exercise traditional federal powers by asserting jurisdiction over interstate and foreign common carrier communications. See *7 FCC Rcd at 4023.* To ensure that Guam did not usurp the Commission's exclusive authority to regulate, the Commission construed the term "any corporation" as used in another provision of the Communications Act of 1934, *47 U.S.C. § 153,* to include public corporations such as Guam's publicly-owned telephone company. See *7 FCC Rcd at 4025.* That decision furthered Congress's clearly expressed intent in *47 U.S.C. § 151* to "centralize authority . . . with respect to interstate and foreign commerce in wire and radio communication" in one federal agency (the Commission). In contrast, Congress did not express any clear intent in § 253(a) to transfer to the Commission the states' traditional power to regulate their subdivisions. Nor is the Commission's interpretation of "entity" inconsistent with its decision in In re: *Classic Telephone, Inc., 11 FCC Rcd 13082 (1996).* There, the Commission overrode the refusals of two Kansas municipalities to grant telephone franchise applications to Classic Telephone, Inc. See *11 FCC Rcd at [*54] 13,083.* The Kansas cities were violating § 253(a) by banning entry to all but one local telephone service provider. See *11 FCC Rcd at 13,095-97.* The case is not at all comparable to the one before us. The Texas Utility Act restricts all municipalities from providing telecommunications services. The question here is whether § 253(a) relieves municipalities from this restriction. Section 253(a) could have this affect only if a municipality were considered an "entity." Classic Telephone has nothing to say on this subject.

n7 In a brief, one-paragraph appeal to "legislative history" consisting of a committee report and two post-enactment letters from Members of Congress, Abilene fails to acknowledge that the statements it quotes deal with an issue not before us--whether public utilities are entities within § 253(a)'s meaning. See Petitioners' Brief at 33, 15-17.

No useful purpose would be served by setting forth Abilene's other arguments. We have considered and rejected them. The critical point is that it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category "any entity." Under Gregory, the petition for judicial review must therefore be denied.

So ordered.

501 U.S. 452 printed in FULL format.

ELLIS GREGORY, JR. AND ANTHONY P. NUGENT, JR., JUDGES, PETITIONERS v. JOHN D. ASHCROFT, GOVERNOR OF MISSOURI

No. 90-50

SUPREME COURT OF THE UNITED STATES

501 U.S. 452; 111 S. Ct. 2395; 1991 U.S. LEXIS 3626; 115 L. Ed. 2d 410; 59 U.S.L.W. 4714; 56 Fair Empl. Prac. Cas. (BNA) 10; 56 Empl. Prac. Dec. (CCH) P40,808; 91 Daily Journal DAR 7293; 13 E.B.C. 2329

March 18, 1991, Argued

June 20, 1991, Decided

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION: *898 F.2d 598*, affirmed.

< =2> View References < =3> Turn Off Lawyers' Edition Display

DECISION: Age Discrimination in Employment Act held not to apply to appointed state judges; mandatory retirement of Missouri judges held not to violate equal protection clause of Fourteenth Amendment.

SUMMARY: The Age Discrimination in Employment Act of 1967 (ADEA) *(29 USCS 621-634)*, as amended in 1974, (1) in *29 USCS 630*(b)(2), includes the states as employers; and (2) in *29 USCS 630*(f), provides that the term "employee" means an individual employed by any employer except that the term shall not include any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level, or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. Several Missouri state judges--including two lower-court judges who had been appointed by the governor and who had subsequently been retained in office by means of retention elections in which the judges had run unopposed and subject to only a "yes or no" vote--filed suit in the United States District Court for the Eastern District of Missouri against the governor, and alleged that the state constitution's provision that all judges other than municipal judges shall retire at the age of 70 years violated the ADEA and the equal protection clause of the United States Constitution's Fourteenth Amendment. The District Court, however, granted the governor's motion to dismiss, on the grounds that (1) Missouri's appointed judges were not protected by the ADEA, because they were appointees on the policymaking level for purposes of 630(f); and (2) the mandatory retirement provision did not violate the equal protection clause, because the provision had a rational basis. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on similar grounds *(898 F2d 598)*.

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and Scalia, Kennedy, and Souter, JJ., and joined in part (as to holding 2 below) by White and Stevens, JJ., it was held that the Missouri Constitution's mandatory retirement provision, as applied to judges who had been appointed by the governor and who had been retained in office by means of such retention elections, did not violate either (1) the ADEA, because the ADEA does not cover appointed state judges, since, in the context of a statute that plainly excludes most important state officials, the ADEA's 630(f) exclusion of appointees on the policymaking level is sufficiently broad that it cannot be concluded that the ADEA plainly covers appointed state judges; or (2) the equal protection clause, because Missouri had a rational basis for distinguishing both between judges who had reached age 70 and judges who were younger, and between judges age 70 and over and other state employees of the same age who were not subject to mandatory retirement.

White, J., joined by Stevens, J., concurring in part, dissenting in part, and concurring in the judgment, expressed the view that (1) the court's "plain statement" requirement for the application of a federal statute to state activities ignored several areas of well-established precedent and announced a rule that was likely to prove unwise and infeasible; but (2) assuming that the Missouri judges in question were "appointed" rather than "elected" within the meaning of the ADEA, the ADEA did not prohibit Missouri's mandatory retirement provision, as applied to the judges in question, because (a) the decisionmaking engaged in by common-law judges such as the judges in question placed them within the ADEA's 630(f) exception for appointees on the policymaking level, (b) such a view was supported by the ADEA's text and legislative history, and (c) the recent litigating position of the Equal Employment Opportunity Commission (EEOC) to the contrary was entitled to little if any deference and was inconsistent with the plain language of the ADEA; and (3) the equal protection clause did not prohibit Missouri's mandatory retirement provision, as applied to the judges in question.

Blackmun, J., joined by Marshall, J., dissenting, agreed with point 1 of the opinion of White, J., but expressed the view that (1) appointed state judges do not fall within the ADEA's narrow 630(f) exception for appointees on the policymaking level, because (a) even assuming that judges may be described as policymakers in certain circumstances, the structure and legislative history of the exclusion make clear that judges are not the kind of policymakers whom Congress intended to exclude from the ADEA's broad reach, and (b) regardless of whether a plausible argument might be made for judges' being policymakers, the court ought to defer to the EEOC's reasonable construction of the ADEA as covering appointed state judges; (2) thus, the Missouri Constitution's mandatory retirement provision violated the ADEA and was invalid; and (3) under such circumstances, it was unnecessary to consider whether the mandatory retirement provision violated the Fourteenth Amendment.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

<=8> CIVIL RIGHTS §7.8

<=9> STATUTES §82.9
Age Discrimination in Employment Act -- appointed state judges -- mandatory retirement --

Headnote: <=10> [1A] <=11> [1B] <=12> [1C] <=13> [1D] <=14> [1E] <=15> [1F] <=16> [1G] <=17> [1H]

The Age Discrimination in Employment Act of 1967 *(29 USCS 621-634)* is not violated by a state constitution's requirement that all judges other than municipal judges shall retire at the age of 70 years--as this requirement is applied to judges who have been appointed by the state's governor and who have been retained in office by means of retention elections in which the judges ran unopposed and subject to only a "yes or no" vote--because the ADEA does not cover appointed state judges, since, in the context of a statute that plainly excludes most important state officials, the ADEA's exclusion in *29 USCS 630*(f) of appointees on the policymaking level is sufficiently broad that it cannot be concluded that the ADEA plainly covers appointed state judges, where (1) 630(f) provides that the term "employee" means an individual employed by any employer except that the term shall not include any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or "an appointee on the policymaking level," or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office; (2) the application of such a "plain statement" requirement for ADEA coverage may avoid a potential constitutional problem as to the limits that the state-federal balance of the nation's constitutional system places on Congress' power under the Federal Constitution's commerce clause (Art I, 8, cl 3); (3) given that 630(f) refers to appointees on the policymaking level, not to appointees who make policy, it may be sufficient that an appointee is in a position requiring the exercise of discretion concerning issues of public importance, a circumstance which describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature; (4) even though the phrase "appointee on the policymaking level," particularly in the context of the other exceptions that surround the phrase, is an odd way for Congress to exclude judges, the ADEA will not be read to cover state judges unless Congress has made it clear that state judges are included, a requirement which does not mean that the ADEA must mention judges explicitly--though the ADEA does not--but that it must be plain to anyone reading the ADEA that the ADEA covers judges; (5) it is at least ambiguous whether a state judge is "an appointee on the policymaking level"; and (6) in the face of such ambiguity, there will not be attributed to Congress an intent to intrude on state governmental functions, regardless of whether Congress, in extending the ADEA in 1974

to employment by state and local governments, was acting pursuant to the commerce clause or pursuant to 5 of the Constitution's Fourteenth Amendment. (White and Stevens, JJ., dissented in part from this holding; Blackmun and Marshall, JJ., dissented from this holding.)

<=20> CIVIL RIGHTS §7.8
age discrimination -- mandatory retirement of state judges -- equal protection clause --

Headnote: <=21> [2A] <=22> [2B] <=23> [2C] <=24> [2D] <=25> [2E] <=26> [2F]
The equal protection clause of the Federal Constitution's Fourteenth Amendment is not violated by a state constitution's requirement that all judges other than municipal judges shall retire at the age of 70 years--as this requirement is applied to judges who have been appointed by the state's governor and who have been retained in office by means of retention elections in which the judges ran unopposed and subject to only a "yes or no" vote--because the state has a rational basis for distinguishing both between judges who have reached age 70 and judges who are younger, and between judges age 70 and over and other state employees of the same age who are not subject to mandatory retirement, for (1) the state need assert only a rational basis for the classification, given that (a) the United States Supreme Court has said repeatedly that age is not a suspect classification under the equal protection clause, and (b) the judges in question do not claim a fundamental interest in serving as judges; (2) such a case deals not merely with government action, but with a state constitutional provision approved by the people of the state as a whole, which provision reflects both the considered judgment of the state legislature that proposed the provision and that of the state's citizens who voted for the provision; (3) the state's highest court--to whom the state constitutional provision applies--declared, in a prior case which involved a state statute that established a mandatory retirement age of 70 for state magistrate and probate judges, numerous legitimate objectives for the statute and rejected an equal protection challenge to the statute; (4) the state's people have a legitimate and compelling interest in maintaining a judiciary fully capable of performing the demanding task that judges must perform; (5) physical and mental capacity sometimes diminish with age; (6) the alternatives of voluntary retirement or impeachment may be insufficient to achieve the desired goal; (7) the retention election process, in which judges run unopposed at relatively long intervals, may also be inadequate, given that (a) most voters never observe state judges in action nor read judicial decisions, and (b) the state's judges serve longer terms than other public officials; (8) such judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed; and (9) even though the mandatory retirement provision is founded on a generalization--and even though it is far from true that all judges suffer significant deterioration in performance at age 70, is probably not true of most judges, and may not be true at all--the state's people could rationally conclude that the threat of deterioration at age 70 was sufficiently great, and the alternatives for removal sufficiently inadequate, that the people would require judges to step aside at age 70.

<=27> CONSTITUTIONAL LAW §68.5

<=28> STATES, TERRITORIES, AND POSSESSIONS §16
federal system -- distribution of power -- separation of powers --

Headnote: <=29> [3]
The United States Constitution establishes a system of dual sovereignty between the states and the Federal Government; pursuant to the Constitution's Tenth Amendment, the Federal Government has limited powers and the states retain substantial sovereign authority; such a federalist structure assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous order, allows for more innovation and experimentation in government, and makes government more responsive by putting the states in competition for a mobile citizenry; perhaps the principal benefit of the federalist system under the United States Constitution is a check on abuses of government power, for, just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the Federal Government will reduce the risk of tyranny and abuse from either front; if this "double security" is to be effective, there must be a proper balance between the states and the Federal Government.

< =30> EVIDENCE §253

< =31> STATES, TERRITORIES, AND POSSESSIONS §18
supremacy of Congress -- assumption --

Headnote: < =32> [4]
Under the Federal Constitution's supremacy clause (Art VI, cl 2), as long as Congress is acting within the powers granted it under the Constitution, Congress may impose its will on the states and legislate in areas traditionally regulated by the states; such an extraordinary power in a federalist system is a power which a court must assume that Congress does not exercise lightly.

< =33> JUDGES §1

< =34> STATES, TERRITORIES, AND POSSESSIONS §34

< =35> STATUTES §82.9
qualifications -- retirement -- regulation by Congress -- clear intent --

Headnote: < =36> [5A] < =37> [5B] < =38> [5C]
It is the prerogative of the people of a state, as citizens of a sovereign state, to establish a qualification for those who sit as their judges, such as a state constitutional provision that all judges other than municipal judges shall retire at the age of 70 years; with respect to such a provision, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual federal constitutional balance of federal and state powers, for such a provision goes beyond an area traditionally regulated by the states and represents a decision of the most fundamental sort for a sovereign entity; such a "plain statement" rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under the federal constitutional scheme. (White, Stevens, Blackmun, and Marshall, JJ., dissented in part from this holding.)

< =39> STATES, TERRITORIES, AND POSSESSIONS §5
sovereignty --

Headnote: < =40> [6]
Through the structure of its government, and the character of those who exercise government authority, a state defines itself as a sovereign.

< =41> STATES, TERRITORIES, AND POSSESSIONS §34
officers -- federal restrictions --

Headnote: < =42> [7]
It is essential to the independence of the states, and to their peace and tranquility, that the states' power to prescribe the qualifications of their officers should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.

< =43> CONSTITUTIONAL LAW §72.5

< =44> STATES, TERRITORIES, AND POSSESSIONS §34
officials -- federal restrictions -- equal protection -- citizenship --

Headnote: < =45> [8A] < =46> [8B] < =47> [8C]

The authority of the people of the states to determine the qualifications of their most important government officials--which authority has been recognized by the United States Supreme Court's "political function" cases, in which the Supreme Court has accorded diminished scrutiny, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, to state "political function" laws--lies at the heart of representative government and is a power reserved to the states under the Constitution's Tenth Amendment and guaranteed to the states under Article IV, 4, of the Constitution, pursuant to which the United States guarantees the states a republican form of government, but such authority is not without limit; other constitutional provisions, most notably the Fourteenth Amendment, proscribe certain qualifications, and the Supreme Court's review of citizenship requirements under the "political function" exception, while less exacting, is not absent.

< =48 > COMMERCE §61
congressional power -- extent of exercise --

Headnote: < =49 > [9A] < =50 > [9B] < =51 > [9C] < =52 > [9D]
The United States Supreme Court's "political function" cases--in which the Supreme Court has accorded diminished scrutiny, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, to state "political function" laws--argue strongly for special care when interpreting alleged congressional intrusions into state sovereignty under the Constitution's commerce clause (Art I, 8, cl 3); the Supreme Court is constrained in its ability to consider the limits that the state-federal balance of the nation's constitutional system places on Congress' powers under the commerce clause; inasmuch as such constraint has left primarily to the political process the protection of the states against intrusive exercises of Congress' commerce clause powers, the Supreme Court must be absolutely certain that Congress intended such exercise, and must not give the state-displacing weight of federal law to mere congressional ambiguity. (White, Stevens, Blackmun, and Marshall, JJ., dissented from this holding.)

< =53 > APPEAL §1662
effect of decision on other grounds --

Headnote: < =54 > [10A] < =55 > [10B]
In a case involving the validity of a state constitution's requirement that all judges other than municipal judges shall retire at the age of 70 years, the United States Supreme Court--on certiorari to review the case in order to determine what Congress did in extending the Age Discrimination in Employment Act of 1967 (ADEA) *(29 USCS 621-634)* to the states pursuant to Congress' powers under the Federal Constitution's commerce clause (Art I, 8, cl 3)--need not consider the limits that the state-federal balance of the nation's constitutional system places on Congress' powers under the commerce clause, if the Supreme Court holds that the ADEA does not apply to state judges.

< =57 > CIVIL RIGHTS §7.8

< =58 > COMMERCE §95
age discrimination in employment -- powers of Congress --

Headnote: < =59 > [11A] < =60 > [11B] < =61 > [11C]
The 1974 extension of the Age Discrimination in Employment Act of 1967 *(29 USCS 621-634)* to employment by state and local governments is a valid exercise of Congress' powers under the Federal Constitution's commerce clause (Art I, 8, cl 3).

< =63 > CIVIL RIGHTS §7.8
age discrimination in employment --

Headnote: < =64 > [12A] < =65 > [12B]
The Age Discrimination in Employment Act of 1967 (ADEA) *(29 USCS 621-634)* covers all state employees except

those excluded by one of the exceptions in *29 USCS 630*(f), where the ADEA, as amended in 1974, (1) in *29 USCS 630*(b)(2), includes the states as employers; and (2) in 630(f), provides that the term "employee" means an individual employed by any employer except that the term shall not include any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level, or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

< =69> STATUTES §112
association of words --

Headnote: < =70> [13]
Under the maxim of statutory construction "noscitur a sociis," a word is known by the company it keeps.

< =71> COMMON LAW §1
sources --

Headnote: < =72> [14]
The common law, unlike a constitution or statute, provides no definitive text, and is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community.

< =73> APPEAL §1662
effect of decision on other grounds --

Headnote: < =74> [15]
On certiorari to review whether the Age Discrimination in Employment Act of 1967 (ADEA) *(29 USCS 621-634)* is violated by a state constitution's requirement that all judges other than municipal judges shall retire at the age of 70 years--as this requirement is applied to judges who have been appointed by the state's governor and who have been retained in office by means of retention elections in which the judges ran unopposed and subject to only a "yes or no" vote--the United States Supreme Court need not consider whether such judges fall within the *29 USCS 630*(f) exception excluding ADEA coverage of persons elected to public office, where the Supreme Court determines that such judges fall within the 630(f) exception excluding ADEA coverage of appointees on the policymaking level.

< =77> CONSTITUTIONAL LAW §314
equal protection -- Fourteenth Amendment --

Headnote: < =78> [16]
Although the equal protection clause of the Federal Constitution's Fourteenth Amendment, by the clause's terms, contemplates interference with state authority, the Fourteenth Amendment does not override all principles of federalism.

< =79> CONSTITUTIONAL LAW §317
equal protection -- classification --

Headnote: < =80> [17]
Under the Federal Constitution's Fourteenth Amendment, in cases where a classification burdens neither a suspect group nor a fundamental interest, courts are quite reluctant to overturn governmental action on the ground that the action denies equal protection of the laws.

< =81> CONSTITUTIONAL LAW §319

equal protection -- rational basis --

Headnote: <=82> [18A] <=83> [18B]
Under the equal protection clause of the Federal Constitution's Fourteenth Amendment, where a state constitutional provision reflects both the considered judgment of the state legislature that proposed the provision and that of the state's citizens who voted for the provision, a court will not overturn such a law unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the people's actions were irrational; in such an equal protection case, those challenging the judgment of the people must convince the court that the facts on which the classification is apparently based could not reasonably be conceived by the decisionmaker.

<=84> CONSTITUTIONAL LAW §317
equal protection -- classification --

Headnote: <=85> [19]
A state does not violate the equal protection clause of the Federal Constitution's Fourteenth Amendment merely because the classifications made by the state's laws are imperfect.

SYLLABUS: Article V, § 26, of the Missouri Constitution provides a mandatory retirement age of 70 for most state judges. Petitioners, judges subject to § 26, were appointed by the Governor and subsequently were retained in office by means of retention elections in which they ran unopposed, subject only to a "yes or no" vote. Along with other state judges, they filed suit against respondent Governor, alleging that § 26 violated the federal Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Protection Clause of the Fourteenth Amendment. The District Court granted the Governor's motion to dismiss, ruling that there was no ADEA violation because Missouri's appointed judges are not covered "employees" within the Act's terms, and that there was no equal protection violation because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. The Court of Appeals affirmed.

Held:

1. Missouri's mandatory retirement requirement for judges does not violate the ADEA. Pp. 456-470.

(a) The authority of a State's people to determine the qualifications of their most important government officials lies "at the heart of representative government," and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV, § 4. See, e. g., *Sugarman v. Dougall, 413 U.S. 634, 648, 37 L. Ed. 2d 853, 93 S. Ct. 2842.* Because congressional interference with the Missouri people's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers, Congress must make its intention to do so "unmistakably clear in the language of the statute." See, e. g., *Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 105 L. Ed. 2d 45, 109 S. Ct. 2304.* Moreover, where Congress acts pursuant to its Commerce Clause power -- as it did in extending the ADEA to the States, see *EEOC v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054* -- the authority of a State's people to determine their government officials' qualifications may be inviolate. Application of the Will plain statement rule to determine whether Congress intended the ADEA to apply to state judges may help the Court to avoid a potential constitutional problem. Pp. 457-464.

(b) Appointed state judges are not covered by the ADEA. When it extended the Act's substantive provisions to include the States as employers, Congress redefined "employee" to exclude all elected and most high-ranking state officials, including "appointee[s] on the policymaking level." It is at least ambiguous whether a state judge is such an appointee. Regardless of whether the judge might be considered to make policy in the same sense as executive officials and legislators, the judge certainly is in a position requiring the exercise of discretion concerning issues of public importance, and therefore might be said to be "on the policymaking level." Thus, it cannot be concluded that the ADEA "makes unmistakably clear," *Will, supra, at 65,* that appointed state judges are covered. Pp. 464-467.

(c) Even if Congress acted pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, in addition to its Commerce Clause powers, when it extended the ADEA to state employment, the ambiguity in the Act's "employee" definition precludes this Court from attributing to Congress an intent to cover appointed state

judges. Although, in *EEOC v. Wyoming, supra, at 243, and n. 18,* the Court noted that the federalism principles constraining Congress' exercise of its Commerce Clause powers are attenuated when it acts pursuant to its § 5 powers, the Court's political-function cases demonstrate that the Fourteenth Amendment does not override all such principles, see, e. g., *Sugarman, supra, at 648.* Of particular relevance here is *Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16, 67 L. Ed. 2d 694, 101 S. Ct. 1531,* in which the Court established that it will not attribute to Congress an unstated intent to intrude on traditional state authority in the exercise of its § 5 powers. That rule looks much like the plain statement rule applied supra, and pertains here in the face of the statutory ambiguity. Pp. 467-470.

2. Missouri's mandatory retirement provision does not violate the Equal Protection Clause. Pp. 470-473.

(a) Petitioners correctly assert their challenge at the rational basis level, since age is not a suspect classification under the Equal Protection Clause, and since they do not claim that they have a fundamental interest in serving as judges. See, e. g., *Vance v. Bradley, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939.* In such circumstances, this Court will not overturn a state constitutional provision unless varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the people's actions in approving it were irrational. Ibid. Pp. 470-471.

(b) The Missouri people rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal from office sufficiently inadequate, that they will require all judges to step aside at that age. Because it is an unfortunate fact of life that physical and mental capacity sometimes diminish with age, the people may wish to replace some older judges in order to satisfy the legitimate, indeed compelling, public interest in maintaining a judiciary fully capable of performing judges' demanding tasks. Although most judges probably do not suffer significant deterioration at age 70, the people could reasonably conceive the basis for the classification to be true. See *Bradley, supra, at 111.* Voluntary retirement will not always be sufficient to serve acceptably the goal of a fully functioning judiciary, nor may impeachment, with its public humiliation and elaborate procedural machinery. The election process may also be inadequate, since most voters never observe judges in action nor read their opinions; since state judges serve longer terms than other officials, making them -- deliberately -- less dependent on the people's will; and since infrequent retention elections may not serve as an adequate check on judges whose performance is deficient. That other state officials are not subject to mandatory retirement is rationally explained by the facts that their performance is subject to greater public scrutiny, that they are subject to more standard elections, that deterioration in their performance is more readily discernible, and that they are more easily removed than judges. Pp. 471-473.

COUNSEL: Jim J. Shoemake argued the cause for petitioners. With him on the briefs were Thomas J. Guilfoil and Bruce Dayton Livingston.

James B. Deutsch, Deputy Attorney General of Missouri, argued the cause for respondent. With him on the brief were William L. Webster, Attorney General, and Michael L. Boicourt, Assistant Attorney General. *

* Cathy Ventrell-Monsees filed a brief for the American Association of Retired Persons as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of Colorado et al. by Scott Harshbarger, Attorney General of Massachusetts, H. Reed Witherby, Special Assistant Attorney General, and Thomas A. Barnico, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: Gale A. Norton of Colorado, Robert A. Butterworth of Florida, Warren Price III of Hawaii, Hubert H. Humphrey III of Minnesota, Donald Stenberg of Nebraska, Robert Del Tufo of New Jersey, Nicholas J. Spaeth of North Dakota, Ernest D. Preate, Jr., of Pennsylvania, Hector Rivera-Cruz of Puerto Rico, James E. O'Neil of Rhode Island, T. Travis Medlock of South Carolina, and Joseph B. Meyer of Wyoming; for the State of Connecticut by Richard Blumenthal, Attorney General, and Arnold B. Feigin and Daniel R. Schaefer, Assistant Attorneys General; for the State of Vermont, Office of Court Administrator, by William B. Gray; for the Missouri Bar by Karen M. Iverson and Timothy K. McNamara; for the National Governors Association et al. by Richard Ruda, Michael J. Wahoske, and Mark B. Rotenberg; and for the Washington Legal Foundation by John C. Cozad, W. Dennis Cross, R. Christopher Abele, Daniel J. Popeo, and John C. Scully.

Daniel G. Spraul filed a brief for Judge John W. Keefe as amicus curiae.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA,

KENNEDY, and SOUTER, JJ., joined, and in Parts I and III of which WHITE and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which STEVENS, J., joined, post, p. 474. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 486.

OPINIONBY: O'CONNOR

OPINION: [*455] JUSTICE O'CONNOR delivered the opinion of the Court. Article V, § 26, of the Missouri Constitution provides that "all judges other than municipal judges shall retire at the age of seventy years." We consider whether this mandatory retirement provision violates the federal Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, *29 U. S. C. §§ 621*-634, and whether it comports with the federal constitutional prescription of equal protection of the laws.

I

Petitioners are Missouri state judges. Judge Ellis Gregory, Jr., is an associate circuit judge for the Twenty-first Judicial Circuit. Judge Anthony P. Nugent, Jr., is a judge of the Missouri Court of Appeals, Western District. Both are subject to the § 26 mandatory retirement provision. Petitioners were appointed to office by the Governor of Missouri, pursuant to the Missouri Non-Partisan Court Plan, Mo. Const., Art. V, §§ 25(a)-25(g). Each has, since his appointment, been retained in office by means of a retention election in which the judge ran unopposed, subject only to a "yes or no" vote. See Mo. Const., Art. V, § 25(c)(1).

[*456] Petitioners and two other state judges filed suit against John D. Ashcroft, the Governor of Missouri, in the United States District Court for the Eastern District of Missouri, challenging the validity of the mandatory retirement provision. The judges alleged that the provision violated both the ADEA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Governor filed a motion to dismiss.

The District Court granted the motion, holding that Missouri's appointed judges are not protected by the ADEA because they are "appointees . . . 'on a policymaking level'" and therefore are excluded from the Act's definition of "employee." App. to Pet. for Cert. 22. The court held also that the mandatory retirement provision does not violate the Equal Protection Clause because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. Id., at 23.

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal. *898 F.2d 598 (1990)*. That court also held that appointed judges are "'appointee[s] on the policymaking level,'" and are therefore not covered under the ADEA. *Id., at 604*. The Court of Appeals held as well that Missouri had a rational basis for distinguishing judges who had reached the age of 70 from those who had not. *Id., at 606*.

We granted certiorari on both the ADEA and equal protection questions, *498 U.S. 979 (1990)*, and now affirm.

II

The ADEA makes it unlawful for an "employer" "to discharge any individual" who is at least 40 years old "because of such individual's age." *29 U. S. C. §§ 623*(a), 631(a). The term "employer" is defined to include "a State or political subdivision of a State." § 630(b)(2). Petitioners work for the State of Missouri. They contend that the Missouri [*457] mandatory retirement requirement for judges violates the ADEA.

A As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt, 493 U.S. 455, 458, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990)*, "we beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over 120 years ago, the Court described the constitutional scheme of dual sovereigns:

"'The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . 'Without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White, 74 U.S. 700, 7 Wall. 700, 725, 19 L. Ed. 227 (1869)*, quoting *Lane County v. Oregon, 74 U.S. 71, 7 Wall. 71, 76, 19 L. Ed. 101 (1869)*.

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:

[*458] "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, Federalism: Evaluating the Founders' Design, *54 U. Chi. L. Rev. 1484, 1491-1511 (1987);* Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, *88 Colum. L. Rev. 1, 3-10 (1988).*

Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985),* quoting *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 572, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)* (Powell, J., dissenting). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would [*459] suppress completely "the attempts of the government to establish a tyranny":

"In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress." The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961).

James Madison made much the same point:

"In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." Id., No. 51, p. 323.

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

[*460] The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly. The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor*

v. Beckham, 178 U.S. 548, 570-571, 44 L. Ed. 1187, 20 S. Ct. 890 (1900). See also *Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 161, 36 L. Ed. 103, 12 S. Ct. 375 (1892)* ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen"). Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero, supra, at 243.* We explained recently:

"If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero [*461] State Hospital v. Scanlon, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985);* see also *Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984).* Atascadero was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)* . . . . 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' *United States v. Bass, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)." Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).*

This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

In a recent line of authority, we have acknowledged the unique nature of state decisions that "go to the heart of representative government." *Sugarman v. Dougall, 413 U.S. 634, 647, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973).* Sugarman was the first in a series of cases to consider the restrictions imposed by the Equal Protection Clause of the Fourteenth Amendment on the ability of state and local governments to prohibit aliens from public employment. In that case, the Court struck down under the Equal Protection Clause a New York City law that provided a flat ban against the employment of aliens in a wide variety of city jobs. Ibid.

The Court did not hold, however, that alienage could never justify exclusion from public employment. We recognized explicitly the States' constitutional power to establish the qualifications for those who would govern:

"Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth [*462] Amendment, the power to regulate elections,' *Oregon v. Mitchell, 400 U.S. 112, 124-125, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970)* (footnote omitted) (opinion of Black, J.); see *id., at 201* (opinion of Harlan, J.), and id., at 293-294 (opinion of STEWART, J.), "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 161, 36 L. Ed. 103, 12 S. Ct. 375 (1892).* See *Luther v. Borden, 48 U.S. 1, 7 How. 1, 41, 12 L. Ed. 581 (1849); Pope v. Williams, 193 U.S. 621, 632-633, 48 L. Ed. 817, 24 S. Ct. 573 (1904).* Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' Dunn v. Blumstein, 405 U.S. [330, 344 (1972)]. And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective and important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." Ibid.

We explained that, while the Equal Protection Clause provides a check on such state authority, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id., at 648.* This rule "is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. U.S. Const. Art. IV, § 4; U.S. Const. Amdt. X; *Luther v. Borden, supra;* see *In re Duncan, 139 U.S. 449, 461, 35 L. Ed. 219, 11 S. Ct. 573 (1891).*" Ibid.

In several subsequent cases we have applied the "political function" exception to laws through which States exclude aliens from positions "intimately related to the process of democratic self-government." See *Bernal v. Fainter, 467 U.S. 216, 220, 81 L. Ed. 2d 175, 104 S. Ct. 2312 (1984).* See also *Nyquist v. Mauclet, 432 U.S. 1, 11, 53 L. Ed. 2d 63, 97 S. Ct. 2120 (1977); Foley v. Connelie, 435 U.S. 291, 295-296, 55 L. Ed. 2d 287, 98 S. Ct. 1067 [*463] (1978); Ambach v. Norwick, 441 U.S. 68, 73-74, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979); Cabell v. Chavez-Salido, 454 U.S. 432, 439-441, 70 L. Ed. 2d 677, 102 S. Ct. 735 (1982).* "We have . .

. lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government.'" *Bernal, 467 U.S. at 221* (citations omitted). These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. * It is an authority that lies at "'the heart of representative government.'" Ibid. It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. See *Sugarman, supra, at 648* (citing the Guarantee Clause and the Tenth Amendment). See also Merritt, *88 Colum. L. Rev., at 50-55.*

* JUSTICE WHITE believes that the "political function" cases are inapposite because they involve limitations on "judicially created scrutiny" rather than "Congress' legislative authority," which is at issue here. Post, at 477. He apparently suggests that Congress has greater authority to interfere with state sovereignty when acting pursuant to its Commerce Clause powers than this Court does when applying the Fourteenth Amendment. Elsewhere in his opinion, JUSTICE WHITE emphasizes that the Fourteenth Amendment was designed as an intrusion on state sovereignty. See post, at 480. That being the case, our diminished scrutiny of state laws in the "political function" cases, brought under the Fourteenth Amendment, argues strongly for special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause.

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. Other constitutional provisions, most notably the Fourteenth Amendment, proscribe certain qualifications; our review of citizenship requirements under the political function exception is less exacting, but it is not absent. [*464] Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the Commerce Clause. See *EEOC v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)* (the extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers under the Commerce Clause). As against Congress' powers "to regulate Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate. We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)* (declining to review limitations placed on Congress' Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests." L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988).

B In 1974, Congress extended the substantive provisions of the ADEA to include the States as employers. Pub. L. 93-259, § 28(a), 88 Stat. 74, *29 U. S. C. § 630*(b)(2). At the same time, Congress amended the definition of "employee" to exclude all elected and most high-ranking government officials. Under the Act, as amended:

[*465] "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." *29 U. S. C. § 630*(f).

Governor Ashcroft contends that the § 630(f) exclusion of certain public officials also excludes judges, like petitioners, who are appointed to office by the Governor and are then subject to retention election. The Governor points to two passages in § 630(f). First, he argues, these judges are selected by an elected official and, because they make policy, are "appointee[s] on the policymaking level." Petitioners counter that judges merely resolve factual disputes and decide questions of law; they do not make policy. Moreover, petitioners point out that the policymaking-level exception is part of a trilogy, tied closely to the elected-official exception. Thus, the Act excepts elected officials and: (1) "any person chosen by such officer to be on such officer's personal staff"; (2) "an appointee on the policymaking level"; and (3) "an immediate advisor with respect to the exercise of the

constitutional or legal powers of the office." Applying the maxim of statutory construction noscitur a sociis -- that a word is known by the company it keeps -- petitioners argue that since (1) and (3) refer only to those in close working relationships with elected officials, so too must (2). Even if it can be said that judges may make policy, petitioners contend, they do not do so at the behest of an elected official. Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed "at the policymaking level." The Governor argues that state judges, in fashioning and applying the common law, make policy. Missouri is a [*466] common law state. See Mo. Rev. Stat. § 1.010 (1986) (adopting "the common law of England" consistent with federal and state law). The common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community. As Justice Holmes put it:

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis." O. Holmes, The Common Law 35-36 (1881).

Governor Ashcroft contends that Missouri judges make policy in other ways as well. The Missouri Supreme Court and Courts of Appeals have supervisory authority over inferior courts. Mo. Const., Art. V, § 4. The Missouri Supreme Court has the constitutional duty to establish rules of practice and procedure for the Missouri court system, and inferior courts exercise policy judgment in establishing local rules of practice. See Mo. Const., Art. V, § 5. The state courts have supervisory powers over the state bar, with the Missouri Supreme Court given the authority to develop disciplinary rules. See Mo. Rev. Stat. §§ 484.040, 484.200-484.270 (1986); Rules Governing the Missouri Bar and the Judiciary (1991). The Governor stresses judges' policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees "on the policymaking level," not to appointees "who make policy." It may be sufficient that the appointee [*467] is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Nonetheless, "appointee at the policymaking level," particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not "employees" would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly, though it does not. Cf. *Dellmuth v. Muth, 491 U.S. 223, 233, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989)* (SCALIA, J., concurring). Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

The ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an "appointee on the policymaking level." Governor Ashcroft points also to the "person elected to public office" exception. He contends that because petitioners -- although appointed to office initially -- are subject to retention election, they are "elected to public office" under the ADEA. Because we conclude that petitioners fall presumptively under the policymaking-level exception, we need not answer this question.

C The extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers [*468] under the Commerce Clause. *EEOC v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983).* In Wyoming, we reserved the questions whether Congress might also have passed the ADEA extension pursuant to its powers under § 5 of the Fourteenth Amendment, and whether the extension would have been a valid exercise of that power. *Id., at 243, and n. 18.* We noted, however, that the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. *Id., at 243, and n. 18,* citing *City of Rome v. United States, 446 U.S. 156, 179, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980).* This is because those "Amendments were specifically designed as

an expansion of federal power and an intrusion on state sovereignty." *Id., at 179.* One might argue, therefore, that if Congress passed the ADEA extension under its § 5 powers, the concerns about federal intrusion into state government that compel the result in this case might carry less weight.

By its terms, the Fourteenth Amendment contemplates interference with state authority: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14. But this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment. We return to the political-function cases. In Sugarman, the Court noted that "aliens as a class 'are a prime example of a "discrete and insular" minority (see *United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)),*' and that classifications based on alienage are 'subject to close judicial scrutiny.'" *413 U.S. at 642,* quoting *Graham v. Richardson, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971).* The Sugarman Court held that New York City had insufficient interest in preventing aliens from holding a broad category of public [*469] jobs to justify the blanket prohibition. *413 U.S. at 647.* At the same time, the Court established the rule that scrutiny under the Equal Protection Clause "will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id., at 648.* Later cases have reaffirmed this practice. See *Foley v. Connelie, 435 U.S. 291, 55 L. Ed. 2d 287, 98 S. Ct. 1067 (1978); Ambach v. Norwick, 441 U.S. 68, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979); Cabell v. Chavez-Salido, 454 U.S. 432, 70 L. Ed. 2d 677, 102 S. Ct. 735 (1982).* These cases demonstrate that the Fourteenth Amendment does not override all principles of federalism.

Of particular relevance here is *Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981).* The question in that case was whether Congress, in passing a section of the Developmentally Disabled Assistance and Bill of Rights Act, *42 U. S. C. § 6010* (1982 ed.), intended to place an obligation on the States to provide certain kinds of treatment to the disabled. Respondent Halderman argued that Congress passed § 6010 pursuant to § 5 of the Fourteenth Amendment, and therefore that it was mandatory on the States, regardless of whether they received federal funds. Petitioner and the United States, as respondent, argued that, in passing § 6010, Congress acted pursuant to its spending power alone. Consequently, § 6010 applied only to States accepting federal funds under the Act.

The Court was required to consider the "appropriate test for determining when Congress intends to enforce" the guarantees of the *Fourteenth Amendment. 451 U.S. at 16.* We adopted a rule fully cognizant of the traditional power of the States: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Ibid. Because Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, we concluded that Congress did not do so. Ibid.

[*470] The Pennhurst rule looks much like the plain statement rule we apply today. In EEOC v. Wyoming, the Court explained that Pennhurst established a rule of statutory construction to be applied where statutory intent is ambiguous. *460 U.S. at 244, n. 18.* In light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included. In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.

III Petitioners argue that, even if they are not covered by the ADEA, the Missouri Constitution's mandatory retirement provision for judges violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioners contend that there is no rational basis for the decision of the people of Missouri to preclude those aged 70 and over from serving as their judges. They claim that the mandatory retirement provision makes two irrational distinctions: between judges who have reached age 70 and younger judges, and between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement. Petitioners are correct to assert their challenge at the level of rational basis. This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause. See *Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-314, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976); Vance v. Bradley, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).* Nor do petitioners claim that they have a fundamental interest in serving as judges. The State need therefore assert only a rational basis for its age classification. See *Murgia, supra, at 314; Bradley,*

440 U.S. at 97. In cases where a classification burdens neither a suspect [*471] group nor a fundamental interest, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws." Ibid. In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it. See 1976 Mo. Laws 812 (proposing the mandatory retirement provision of § 26); Mo. Const., Art. XII, §§ 2(a), 2(b) (describing the amendment process). "We will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Bradley, supra, at 97.* See also *Pennell v. San Jose, 485 U.S. 1, 14, 99 L. Ed. 2d 1, 108 S. Ct. 849 (1988).* Governor Ashcroft cites *O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978)* (en banc), as a fruitful source of rational bases. In O'Neil, the Missouri Supreme Court -- to whom Missouri Constitution Article V, § 26, applies -- considered an equal protection challenge to a state statute that established a mandatory retirement age of 70 for state magistrate and probate judges. The court upheld the statute, declaring numerous legitimate state objectives it served: "The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system"; "the statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not"; "mandatory retirement increases the opportunity for qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement"; "such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans." *Id., at 766-767.* Any one of these explanations is sufficient to rebut the claim [*472] that "the varying treatment of different groups or persons [in § 26] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Bradley, supra, at 97.*

The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. See *Bradley, supra, at 111-112; Murgia, supra, at 315.* The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient. Nor may impeachment -- with its public humiliation and elaborate procedural machinery -- serve acceptably the goal of a fully functioning judiciary. See Mo. Const., Art. VII, §§ 1-3.

The election process may also be inadequate. Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. Most voters never observe state judges in action, nor read judicial opinions. State judges also serve longer terms of office than other public officials, making them -- deliberately -- less dependent on the will of the people. Compare Mo. Const., Art. V, § 19 (Supreme Court justices and Court of Appeals judges serve 12-year terms; Circuit Court judges 6 years), with Mo. Const., Art. IV, § 17 (Governor, Lieutenant Governor, secretary of state, state treasurer, and attorney general serve 4-year terms) and Mo. Const., Art. III, § 11 (state representatives serve 2-year terms; state senators 4 years). Most of these judges do not run in ordinary elections. See Mo. Const., Art. V, § 25(a). The people of Missouri rationally could conclude that retention elections -- in which state judges run unopposed at relatively long intervals -- do not serve as an adequate check on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma.

[*473] This is also a rational explanation for the fact that state judges are subject to a mandatory retirement provision, while other state officials -- whose performance is subject to greater public scrutiny, and who are subject to more standard elections -- are not. Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed. The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. But a State "'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Murgia, 427 U.S. at 316,* quoting *Dandridge v. Williams, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).* "In an equal protection case of this type . . . those challenging the . . . judgment [of the people] must convince the court that the . . . facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker." *Bradley, 440 U.S. at 111.* The people of Missouri rationally could conclude that the threat of deterioration at

age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70. This classification does not violate the Equal Protection Clause.

IV The people of Missouri have established a qualification for those who would be their judges. It is their prerogative as citizens of a sovereign State to do so. Neither the ADEA nor the Equal Protection Clause prohibits the choice they have made. Accordingly, the judgment of the Court of Appeals is

Affirmed.

CONCURBY: WHITE (In Part)

DISSENTBY: WHITE (In Part); BLACKMUN

DISSENT: [*474] JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in part, dissenting in part, and concurring in the judgment.

I agree with the majority that neither the Age Discrimination in Employment Act of 1967 (ADEA) nor the Equal Protection Clause prohibits Missouri's mandatory retirement provision as applied to petitioners, and I therefore concur in the judgment and in Parts I and III of the majority's opinion. I cannot agree, however, with the majority's reasoning in Part II of its opinion, which ignores several areas of well-established precedent and announces a rule that is likely to prove both unwise and infeasible. That the majority's analysis in Part II is completely unnecessary to the proper resolution of this case makes it all the more remarkable.

I

In addition to petitioners' equal protection claim, we granted certiorari to decide the following question:

"Whether appointed Missouri state court judges are 'appointee[s] on the policymaking level' within the meaning of the Age Discrimination in Employment Act ('ADEA'), *28 U. S. C. §§ 621*-34 (1982 & Supp. V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution." Pet. for Cert. i.

The majority, however, chooses not to resolve that issue of statutory construction. Instead, it holds that whether or not the ADEA can fairly be read to exclude state judges from its scope, "we will not read the ADEA to cover state judges unless Congress has made it clear that judges are included." Ante, at 467 (emphasis in original). I cannot agree with this "plain statement" rule because it is unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound.

[*475] Among other things, the ADEA makes it "unlawful for an employer -- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *29 U. S. C. § 623*(a). In 1974, Congress amended the definition of "employer" in the ADEA to include "a State or political subdivision of a State." § 630(b)(2). With that amendment, "there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States." *EEOC v. Wyoming, 460 U.S. 226, 244, n. 18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983).*

The dispute in this case therefore is not whether Congress has outlawed age discrimination by the States. It clearly has. The only question is whether petitioners fall within the definition of "employee" in the Act, § 630(f), which contains exceptions for elected officials and certain appointed officials. If petitioners are "employee[s]," Missouri's mandatory retirement provision clearly conflicts with the antidiscrimination provisions of the ADEA. Indeed, we have noted that the "policies and substantive provisions of the [ADEA] apply with especial force in the case of mandatory retirement provisions." *Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410, 86 L. Ed. 2d 321, 105 S. Ct. 2743 (1985).* Pre-emption therefore is automatic, since "state law is pre-empted to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983).* The majority's federalism concerns are irrelevant to such "actual conflict" pre-emption. "'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982),* quoting *Free v. Bland, 369 U.S. 663, 666, 8 L. Ed. 2d 180, 82 S. Ct. 1089 (1962).*

While acknowledging this principle of federal legislative supremacy, see ante, at 460, the majority nevertheless imposes [*476] upon Congress a "plain statement" requirement. The majority claims to derive this requirement from the plain statement approach developed in our Eleventh Amendment cases, see, e. g., *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985),* and applied two Terms ago in *Will v. Michigan Dept. of State Police, 491 U.S.*

58, 65, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). The issue in those cases, however, was whether Congress intended a particular statute to extend to the States at all. In Atascadero, for example, the issue was whether States could be sued under § 504 of the Rehabilitation Act of 1973, *29 U. S. C. § 794.* Similarly, the issue in Will was whether States could be sued under *42 U. S. C. § 1983.* In the present case, by contrast, Congress has expressly extended the coverage of the ADEA to the States and their employees. Its intention to regulate age discrimination by States is thus "unmistakably clear in the language of the statute." *Atascadero, supra, at 242.* See *Davidson v. Board of Governors of State Colleges and Universities, 920 F.2d 441, 443 (CA7 1990)* (ADEA satisfies "clear statement" requirement). The only dispute is over the precise details of the statute's application. We have never extended the plain statement approach that far, and the majority offers no compelling reason for doing so.

The majority also relies heavily on our cases addressing the constitutionality of state exclusion of aliens from public employment. See ante, at 461-463, 468-470. In those cases, we held that although restrictions based on alienage ordinarily are subject to strict scrutiny under the Equal Protection Clause, see *Graham v. Richardson, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971),* the scrutiny will be less demanding for exclusion of aliens "from positions intimately related to the process of democratic self-government." *Bernal v. Fainter, 467 U.S. 216, 220, 81 L. Ed. 2d 175, 104 S. Ct. 2312 (1984).* This narrow "political-function" exception to the strict-scrutiny standard is based on the "State's historical power to exclude aliens from participation in its [*477] democratic political institutions." *Sugarman v. Dougall, 413 U.S. 634, 648, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973).*

It is difficult to see how the "political-function" exception supports the majority's plain statement rule. First, the exception merely reflects a determination of the scope of the rights of aliens under the Equal Protection Clause. Reduced scrutiny is appropriate for certain political functions because "the right to govern is reserved to citizens." *Foley v. Connelie, 435 U.S. 291, 297, 55 L. Ed. 2d 287, 98 S. Ct. 1067 (1978);* see also *Sugarman, supra, at 648-649.* This conclusion in no way establishes a method for interpreting rights that are statutorily created by Congress, such as the protection from age discrimination in the ADEA. Second, it is one thing to limit judicially created scrutiny, and it is quite another to fashion a restraint on Congress' legislative authority, as does the majority; the latter is both countermajoritarian and an intrusion on a coequal branch of the Federal Government. Finally, the majority does not explicitly restrict its rule to "functions that go to the heart of representative government," *413 U.S. at 647,* and may in fact be extending it much further to all "state governmental functions." See ante, at 470.

The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985),* and *South Carolina v. Baker, 485 U.S. 505, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988).* In those cases we made it clear "that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *Id., at 512.* We also rejected as "unsound in principle and unworkable in practice" any test for state immunity that requires a judicial determination of which state activities are "'traditional,'" "'integral,'" or "'necessary.'" *Garcia, supra, at 546.* The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation.

[*478] The majority's approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? See ante, at 464. Or does it apply more broadly to the regulation of any "state governmental functions"? See ante, at 470. Second, the majority does not explain its requirement that Congress' intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." See ante, at 467. Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities? If so, the majority's rule is completely inconsistent with our preemption jurisprudence. See, e. g., *Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)* (preemption will be found where there is a "'clear and manifest purpose'" to displace state law) (emphasis added). The vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of state activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate.

The imposition of such a burden on Congress is particularly out of place in the context of the ADEA. Congress already has stated that all "individual[s] employed by any employer" are protected by the ADEA unless they are expressly excluded by one of the exceptions in the def-

inition of "employee." See *29 U. S. C. § 630*(f). The majority, however, turns the statute on its head, holding that state judges are not protected by the ADEA because "Congress has [not] made it clear that judges are included." Ante, at 467 (emphasis in original). Cf. *EEOC v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)*, where we held that state game wardens are covered by the ADEA, even though such employees are not expressly included within the ADEA's scope.

[*479] The majority asserts that its plain statement rule is helpful in avoiding a "potential constitutional problem." Ante, at 464. It is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decisions in Garcia and Baker, discussed above. As long as "the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker, supra, at 513*. There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being "unduly burdened" by the Federal Government. See *Garcia, supra, at 556*. In any event, as discussed below, a straightforward analysis of the ADEA's definition of "employee" reveals that the ADEA does not apply here. Thus, even if there were potential constitutional problems in extending the ADEA to state judges, the majority's proposed plain statement rule would not be necessary to avoid them in this case. Indeed, because this case can be decided purely on the basis of statutory interpretation, the majority's announcement of its plain statement rule, which purportedly is derived from constitutional principles, violates our general practice of avoiding the unnecessary resolution of constitutional issues.

My disagreement with the majority does not end with its unwarranted announcement of the plain statement rule. Even more disturbing is its treatment of Congress' power under § 5 of the Fourteenth Amendment. See ante, at 467-470. Section 5 provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Despite that sweeping constitutional delegation of authority to Congress, the majority holds that its plain statement rule will apply with full force to legislation enacted to enforce the Fourteenth Amendment. The majority states: "In the face of . . . ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its [*480] Commerce Clause powers or § 5 of the Fourteenth Amendment." Ante, at 470 (emphasis added). n1

n1 In *EEOC v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)*, we held that the extension of the ADEA to the States was a valid exercise of congressional power under the Commerce Clause. We left open, however, the issue whether it was also a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. Cf. *Fitzpatrick v. Bitzer, 427 U.S. 445, 453, n. 9, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)* (extension of Title VII of Civil Rights Act of 1964 to States was pursuant to Congress' § 5 power). Although we need not resolve the issue in this case, I note that at least two Courts of Appeals have held that the ADEA was enacted pursuant to Congress' § 5 power. See *Heiar v. Crawford County, 746 F.2d 1190, 1193-1194 (CA7 1984); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 700 (CA1 1983)*.

The majority's failure to recognize the special status of legislation enacted pursuant to § 5 ignores that, unlike Congress' Commerce Clause power, "when Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)*. Indeed, we have held that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States, 446 U.S. 156, 179, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980)*; see also *EEOC v. Wyoming, supra, at 243, n. 18*.

The majority relies upon *Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)*, see ante, at 469-470, but that case does not support its approach. There, the Court merely stated that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *451 U.S., at 16*. In other words, the Pennhurst presumption was designed only to answer the question whether a particular piece of legislation [*481] was enacted pursuant to § 5. That is very different from the majority's apparent holding that even when Congress is acting pursuant to § 5, it nevertheless must specify the precise details of its enactment.

The majority's departures from established precedent are even more disturbing when it is realized, as dis-

cussed below, that this case can be affirmed based on simple statutory construction.

II

The statute at issue in this case is the ADEA's definition of "employee," which provides:

"The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision." *29 U. S. C. § 630*(f).

A parsing of that definition reveals that it excludes from the definition of "employee" (and thus the coverage of the ADEA) four types of (noncivil service) state and local employees: (1) persons elected to public office; (2) the personal staff of elected officials; (3) persons appointed by elected officials to be on the policymaking level; and (4) the immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices.

The question before us is whether petitioners fall within the third exception. *Like the Court of Appeals, see 898 F.2d 598, 600 (CA8 1990),* I assume that petitioners, who were initially appointed to their positions by the Governor of [*482] Missouri, are "appointed" rather than "elected" within the meaning of the ADEA. For the reasons below, I also conclude that petitioners are "on the policymaking level." n2

n2 Most of the lower courts that have addressed the issue have concluded that appointed state judges fall within the "appointee[s] on the policymaking level" exception. See *898 F.2d 598 (CA8 1990)* (case below); *EEOC v. Massachusetts, 858 F.2d 52 (CA1 1988); Sabo v. Casey, 757 F. Supp. 587 (ED Pa. 1991); In re Stout, 521 Pa. 571, 559 A.2d 489 (1989);* see also *EEOC v. Illinois, 721 F. Supp. 156 (ND Ill. 1989).* But see *EEOC v. Vermont, 904 F.2d 794 (CA2 1990); Schlitz v. Virginia, 681 F. Supp. 330* (ED Va.), rev'd on other grounds, *854 F.2d 43 (CA4 1988).*

"Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." Webster's Third New International Dictionary 1754 (1976). Applying that definition, it is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them "on the policymaking level." In resolving disputes, although judges do not operate with unconstrained discretion, they do choose "from among alternatives" and elaborate their choices in order "to guide and . . . determine present and future decisions." The quotation from Justice Holmes in the majority's opinion, see ante, at 466, is an eloquent description of the policymaking nature of the judicial function. Justice Cardozo also stated it well:

"Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . . Within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made." B. Cardozo, The Nature of the Judicial Process 113-115 (1921).

[*483] Moreover, it should be remembered that the statutory exception refers to appointees "on the policymaking level," not "policymaking employees." Thus, whether or not judges actually make policy, they certainly are on the same level as policymaking officials in other branches of government and therefore are covered by the exception. The degree of responsibility vested in judges, for example, is comparable to that of other officials that have been found by the lower courts to be on the policymaking level. See, e. g., *EEOC v. Reno, 758 F.2d 581 (CA11 1985)* (assistant state attorney); *EEOC v. Board of Trustees of Wayne Cty. Community College, 723 F.2d 509 (CA6 1983)* (president of community college).

Petitioners argue that the "appointee[s] on the policymaking level" exception should be construed to apply "only to persons who advise or work closely with the elected official that chose the appointee." Brief for Petitioners 18. In support of that claim, petitioners point out that the exception is "sandwiched" between the "personal staff" and "immediate adviser" exceptions in § 630(f), and thus should be read as covering only similar employees.

Petitioners' premise, however, does not prove their conclusion. It is true that the placement of the "appointee" exception between the "personal staff" and "immediate adviser" exceptions suggests a similarity among

the three. But the most obvious similarity is simply that each of the three sets of employees are connected in some way with elected officials: The first and third sets have a certain working relationship with elected officials, while the second is appointed by elected officials. There is no textual support for concluding that the second set must also have a close working relationship with elected officials. Indeed, such a reading would tend to make the "appointee" exception superfluous since the "personal staff" and "immediate adviser" exceptions would seem to cover most appointees who are in a close working relationship with elected officials.

[*484] Petitioners seek to rely on legislative history, but it does not help their position. There is little legislative history discussing the definition of "employee" in the ADEA, so petitioners point to the legislative history of the identical definition in Title VII of the Civil Rights Act of 1964, *42 U. S. C. § 2000e*(f). If anything, that history tends to confirm that the "appointee[s] on the policymaking level" exception was designed to exclude from the coverage of the ADEA all highlevel appointments throughout state government structures, including judicial appointments.

For example, during the debates concerning the proposed extension of Title VII to the States, Senator Ervin repeatedly expressed his concern that the (unamended) definition of "employee" would be construed to reach those "persons who exercise the legislative, executive, and judicial powers of the States and political subdivisions of the States." 118 Cong. Rec. 1838 (1972) (emphasis added). Indeed, he expressly complained that "there is not even an exception in the [unamended] bill to the effect that the EEOC will not have jurisdiction over . . . State judges, whether they are elected or appointed to office." Id., at 1677. Also relevant is Senator Taft's comment that, in order to respond to Senator Ervin's concerns, he was willing to agree to an exception not only for elected officials, but also for "those at the top decisionmaking levels in the executive and judicial branch as well." Id., at 1838.

The definition of "employee" subsequently was modified to exclude the four categories of employees discussed above. The Conference Committee that added the "appointee[s] on the policymaking level" exception made clear the separate nature of that exception:

"It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as [*485] cabinet officers, and persons with comparable responsibilities at the local level." H. R. Conf. Rep. No. 92-899, pp. 15-16 (1972) (emphasis added).

The italicized "or" in that statement indicates, contrary to petitioners' argument, that appointed officials need not be advisers to be covered by the exception. Rather, it appears that "Congress intended two categories: policymakers, who need not be advisers; and advisers, who need not be policymakers." *EEOC v. Massachusetts, 858 F.2d 52, 56 (CA1 1988)*. This reading is confirmed by a statement by one of the House Managers, Representative Erlenborn, who explained that "in the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policymaking positions." 118 Cong. Rec., at 7567.

In addition, the phrase "the highest levels" in the Conference Report suggests that Congress' intent was to limit the exception "down the chain of command, and not so much across agencies or departments." *EEOC v. Massachusetts, 858 F.2d at 56.* I also agree with the First Circuit's conclusion that even lower court judges fall within the exception because "each judge, as a separate and independent judicial officer, is at the very top of his particular 'policymaking' chain of command, responding . . . only to a higher appellate court." Ibid.

For these reasons, I would hold that petitioners are excluded from the coverage of the ADEA because they are "appointee[s] on the policymaking level" under *29 U. S. C. § 630*(f). n3

n3 The dissent argues that we should defer to the EEOC's view regarding the scope of the "policymaking level" exception. See post, at 493-494. I disagree. The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's litigating position in recent lawsuits. Accordingly, it is entitled to little if any deference. See, e. g., *Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-213, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988); St. Agnes Hospital v. Sullivan, 284 U.S. App. D.C. 396, 401, 905 F.2d 1563, 1568 (1990).* Although the dissent does cite to an EEOC decision involving the policymaking exception in Title VII, see post, at 494, that decision did not state, even in dicta, that the exception is limited to those who work closely with elected officials. Rather, it merely stated that the exception applies to officials "on the highest levels of state or local government." CCH EEOC Decisions (1983) P6725. In any event, the EEOC's position is, for the reasons discussed above, inconsistent with the plain language of the statute at

issue. "No deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171, 106 L. Ed. 2d 134, 109 S. Ct. 2854 (1989).*

[*486] I join Parts I and III of the Court's opinion and concur in its judgment.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

I agree entirely with the cogent analysis contained in Part I of JUSTICE WHITE's opinion, ante, at 474-481. For the reasons well stated by JUSTICE WHITE, the question we must resolve is whether appointed Missouri state judges are excluded from the general prohibition of mandatory retirement that Congress established in the federal Age Discrimination in Employment Act of 1967 (ADEA), *29 U. S. C. §§ 621*-634. I part company with JUSTICE WHITE, however, in his determination that appointed state judges fall within the narrow exclusion from ADEA coverage that Congress created for an "appointee on the policymaking level." § 630(f).

I

For two reasons, I do not accept the notion that an appointed state judge is an "appointee on the policymaking level." First, even assuming that judges may be described as policymakers in certain circumstances, the structure and legislative history of the policymaker exclusion make clear that judges are not the kind of policymakers whom Congress intended to exclude from the ADEA's broad reach. Second, [*487] whether or not a plausible argument may be made for judges' being policymakers, I would defer to the EEOC's reasonable construction of the ADEA as covering appointed state judges.

A

Although it may be possible to define an appointed judge as a "policymaker" with only a dictionary as a guide, n1 we have an obligation to construe the exclusion of an "appointee on the policymaking level" with a sensitivity to the context in which Congress placed it. In construing an undefined statutory term, this Court has adhered steadfastly to the rule that "'"'words grouped in a list should be given related meaning,'"'" *Dole v. Steelworkers, 494 U.S. 26, 36, 108 L. Ed. 2d 23, 110 S. Ct. 929 (1990),* quoting *Massachusetts v. Morash, 490 U.S. 107, 114-115, 104 L. Ed. 2d 98, 109 S. Ct. 1668 (1989),* quoting *Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8, 86 L. Ed. 2d 1, 105 S. Ct. 2458 (1985),* quoting *Securities Industry Assn. v. Board of Governors, FRS, 468 U.S. 207, 218, 82 L. Ed. 2d 158, 104 S. Ct. 3003 (1984),* and that "'in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of [*488] the whole law, and to its object and policy.'" *Morash, 490 U.S. at 115,* quoting *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987).* Applying these maxims of statutory construction, I conclude that an appointed state judge is not the kind of "policymaker" whom Congress intended to exclude from the protection of the ADEA.

n1 JUSTICE WHITE finds the dictionary definition of "policymaker" broad enough to include the Missouri judges involved in this case, because judges resolve disputes by choosing "'from among alternatives' and elaborate their choices in order 'to guide and . . . determine present and future decisions.'" Ante, at 482. See also *898 F.2d 598, 601 (CA8 1990)* (case below), quoting *EEOC v. Massachusetts, 858 F.2d 52, 55 (CA1 1988).* I hesitate to classify judges as policymakers, even at this level of abstraction. Although some part of a judge's task may be to fill in the interstices of legislative enactments, the primary task of a judicial officer is to apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions. A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislators. See *EEOC v. Vermont, 904 F.2d 794, 800-801 (CA2 1990).*

Nor am I persuaded that judges should be considered policymakers because they sometimes fashion court rules and are otherwise involved in the administration of the state judiciary. See *In re Stout, 521 Pa. 571, 583-586, 559 A.2d 489, 495-497 (1989).* These housekeeping tasks are at most ancillary to a judge's primary function described above.

The policymaker exclusion is placed between the exclusion of "any person chosen by such [elected] officer to be on such officer's personal staff" and the exclusion of "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." See *29 U. S. C. § 630*(f). Reading the policymaker exclusion in light of the other categories of employees listed with it, I conclude that the class of "appointee[s] on the policymaking level" should be limited to those officials who share the characteristics of personal staff members and immediate advisers, i. e., those who work closely with

the appointing official and are directly accountable to that official. Additionally, I agree with the reasoning of the Second Circuit in *EEOC v. Vermont, 904 F.2d 794 (1990):*

"Had Congress intended to except a wide-ranging category of policymaking individuals operating wholly independently of the elected official, it would probably have placed that expansive category at the end of the series, not in the middle." *Id., at 798.*

Because appointed judges are not accountable to the official who appoints them and are precluded from working closely with that official once they have been appointed, they are not "appointee[s] on the policymaking level" for purposes of *29 U. S. C. § 630*(f). n2

n2 I disagree with JUSTICE WHITE's suggestion that this reading of the policymaking exclusion renders it superfluous. Ante, at 483. There exist policymakers who work closely with an appointing official but who are appropriately classified as neither members of his "personal staff" nor "immediate adviser[s] with respect to the exercise of the constitutional or legal powers of the office." Among others, certain members of the Governor's Cabinet and hign level state agency officials well might be covered by the policymaking exclusion, as I construe it.

[*489] B

The evidence of Congress' intent in enacting the policymaking exclusion supports this narrow reading. As noted by JUSTICE WHITE, ante, at 484, there is little in the legislative history of § 630(f) itself to aid our interpretive endeavor. Because Title VII of the Civil Rights Act of 1964, § 701(f), as amended, *42 U. S. C. § 2000e*(f), contains language identical to that in the ADEA's policymaking exclusion, however, we accord substantial weight to the legislative history of the cognate Title VII provision in construing § 630(f). See *Lorillard v. Pons, 434 U.S. 575, 584, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978)* (noting that "the prohibitions of the ADEA were derived in haec verba from Title VII"). See also *Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756, 60 L. Ed. 2d 609, 99 S. Ct. 2066 (1979); EEOC v. Vermont, 904 F.2d at 798.*

When Congress decided to amend Title VII to include States and local governments as employers, the original bill did not contain any employee exclusion. As JUSTICE WHITE notes, ante, at 484, the absence of a provision excluding certain state employees was a matter of concern for Senator Ervin, who commented that the bill, as reported, did not contain a provision "to the effect that the EEOC will not have jurisdiction over . . . State judges, whether they are elected or appointed to office . . . ." 118 Cong. Rec. 1677 (1972). Because this floor comment refers to appointed judges, JUSTICE WHITE concludes that the later amendment containing the exclusion of "an appointee on the policymaking level" was drafted in response to the concerns raised by Senator Ervin and others, ante, at 484-485, and therefore should be read to include judges.

Even if the only legislative history available was the above-quoted statement of Senator Ervin and the final [*490] amendment containing the policymaking exclusion, I would be reluctant to accept JUSTICE WHITE's analysis. It would be odd to conclude that the general exclusion of those "on the policymaking level" was added in response to Senator Ervin's very specific concern about appointed judges. Surely, if Congress had desired to exclude judges -- and was responding to a specific complaint that judges would be within the jurisdiction of the EEOC -- it would have chosen far clearer language to accomplish this end. n3 In any case, a more detailed look at the genesis of the policymaking exclusion seriously undermines the suggestion that it was intended to include appointed judges.

n3 The majority acknowledges this anomaly by noting that "'appointee [on] the policymaking level,' particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient phrasing." Ante, at 467. The majority dismisses this objection not by refuting it, but by noting that "we are not looking for a plain statement that judges are excluded." Ibid. For the reasons noted in Part I of JUSTICE WHITE's opinion, this reasoning is faulty; appointed judges are covered unless they fall within the enumerated exclusions.

After commenting on the absence of an employee exclusion, Senator Ervin proposed the following amendment:

"The term 'employee' as set forth in the original act of 1964 and as modified by the pending bill shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such person to advise him in respect to the exercise of the constitutional or le-

gal powers of his office." 118 Cong. Rec. 4483 (1972).

Noticeably absent from this proposed amendment is any reference to those on the policymaking level or to judges. Senator Williams then suggested expanding the proposed amendment to include the personal staff of the elected individual, leading Senators Williams and Ervin to engage in the following discussion about the purpose of the amendment:

[*491] "Mr. WILLIAMS: . . . .

". . . First, State and local governments are now included under the bill as employers. The amendment would provide, for the purposes of the bill and for the basic law, that an elected individual is not an employee and, therefore, the law could not cover him. The next point is that the elected official would, in his position as an employer, not be covered and would be exempt in the employment of certain individuals.

. . . .

". . . Basically the purpose of the amendment . . . is to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers. Is that basically the purpose of the Senator's amendment?

" Mr. ERVIN: I would say to my good friend from New Jersey that that is the purpose of the amendment." Id., at 4492-4493.

Following this exchange, Senator Ervin's amendment was expanded to exclude "any person chosen by such officer to be a personal assistant." Id., at 4493. The Senate adopted these amendments, voting to exclude both personal staff members and immediate advisers from the scope of Title VII.

The policymaker exclusion appears to have arisen from Senator Javits' concern that the exclusion for advisers would sweep too broadly, including hundreds of functionaries such as "lawyers, . . . stenographers, subpena servers, researchers, and so forth." Id., at 4097. Senator Javits asked "to have overnight to check into what would be the status of that rather large group of employees," noting that he "realized that . . . Senator [Ervin was] . . . seeking to confine it to the higher officials in a policymaking or policy advising capacity." [*492] Ibid. In an effort to clarify his point, Senator Javits later stated:

"The other thing, the immediate advisers, I was thinking more in terms of a cabinet, of a Governor who would call his commissioners a cabinet, or he may have a cabinet composed of three or four executive officials, or five or six, who would do the main and important things. That is what I would define those things expressly to mean." Id., at 4493.

Although Senator Ervin assured Senator Javits that the exclusion of personal staff and advisers affected only the classes of employees that Senator Javits had mentioned, ibid., the Conference Committee eventually adopted a specific exclusion of an "appointee on the policymaking level" as well as the exclusion of personal staff and immediate advisers contained in the Senate bill. In explaining the scope of the exclusion, the conferees stated:

"It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees[']intent that this exemption shall be construed narrowly." S. Conf. Rep. No. 92-681, pp. 15-16 (1972).

The foregoing history decisively refutes the argument that the policymaker exclusion was added in response to Senator Ervin's concern that appointed state judges would be protected by Title VII. Senator Ervin's own proposed amendment did not exclude those on the policymaking level. Indeed, Senator Ervin indicated that all of the policymakers he sought to have excluded from the coverage of Title VII were encompassed in the exclusion of personal staff and immediate advisers. It is obvious that judges are neither staff nor immediate [*493] advisers of any elected official. The only indication as to whom Congress understood to be "appointee[s] on the policymaking level" is Senator Javits' reference to members of the Governor's cabinet, echoed in the Conference Committee's use of "cabinet officers " as an example of the type of appointee at the policymaking level excluded from Title VII's definition of "employee." When combined with the Conference Committee's exhortation that the exclusion be construed narrowly, this evidence indicates that Congress did not intend appointed state judges to be excluded from the reach of Title VII or the ADEA.

C

This Court has held that when a statutory term is ambiguous or undefined, a court construing the statute should defer to a reasonable interpretation of that term proffered by the agency entrusted with administering the statute. See *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* Thus, even

were I to conclude that one might read the exclusion of an "appointee on the policymaking level" to include state judges, our precedent would compel me to accept the EEOC's contrary reading of the exclusion if it were a "permissible" interpretation of this ambiguous term. *Id., at 843.* This Court has recognized that "it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co., 486 U.S. 107, 115, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1988).* The EEOC's interpretation of ADEA provisions is entitled to the same deference as its interpretation of analogous provisions in Title VII. See *Oscar Mayer & Co. v. Evans, 441 U.S. at 761,* citing *Griggs v. Duke Power Co., 401 U.S. 424, 434, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971).*

[*494] The EEOC consistently has taken the position that an appointed judge is not an "appointee on the policymaking level" within the meaning of *29 U. S. C. § 630*(f). See *EEOC v. Vermont, 904 F.2d 794 (CA2 1990); EEOC v. Massachusetts, 858 F.2d 52 (CA1 1988); EEOC v. Illinois, 721 F. Supp. 156 (ND Ill. 1989).* Relying on the legislative history detailed above, the EEOC has asserted that Congress intended the policymaker exclusion to include only "'an elected official's first line advisers.'" *EEOC v. Massachusetts, 858 F.2d at 55.* See also CCH EEOC Decisions (1983) P6725 (discussing the meaning of the policymaker exclusion under Title VII, and stating that policymakers "must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials"). As is evident from the foregoing discussion, I believe this to be a correct reading of the statute and its history. At a minimum, it is a "permissible" reading of the indisputably ambiguous term "appointee on the policymaking level." Accordingly, I would defer to the EEOC's reasonable interpretation of this term. n4

n4 Relying on *Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988),* JUSTICE WHITE would conclude that the EEOC's view of the scope of the policymaking exclusion is entitled to "little if any deference" because it is "merely the EEOC's litigating position in recent lawsuits." Ante, at 485, n. 3. This case is distinguishable from Bowen, however, in two important respects. First, unlike in Bowen, where the Court declined to defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *488 U.S. at 212,* the EEOC here has issued an administrative ruling construing Title VII's cognate policymaking exclusion that is entirely consistent with the agency's subsequent "litigation position" that appointed judges are not the kind of officials on the policymaking level whom Congress intended to exclude from ADEA coverage. See CCH EEOC Decisions (1983) P6725. Second, the Court in Bowen emphasized that the agency had failed to offer "a reasoned and consistent view of the scope of" the relevant statute and had proffered an interpretation of the statute that was "contrary to the narrow view of that provision advocated in past cases." See *488 U.S. at 212-213.* In contrast, however, the EEOC never has wavered from its view that the policymaking exclusion does not apply to appointed judges. Thus, this simply is not a case in which a court is asked to defer to "nothing more than an agency's convenient litigating position." *Id., at 213.* For all the reasons that deference was inappropriate in Bowen, it is appropriate here.

[*495] II

The Missouri constitutional provision mandating the retirement of a judge who reaches the age of 70 violates the ADEA and is, therefore, invalid. n5 Congress enacted the ADEA with the express purpose "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *29 U. S. C. § 621.* Congress provided for only limited exclusions from the coverage of the ADEA, and exhorted courts applying this law to construe such exclusions narrowly. The statute's structure and legislative history reveal that Congress did not intend an appointed state judge to be beyond the scope of the ADEA's protective reach. Further, the EEOC, which is charged with the enforcement of the ADEA, has determined that an appointed state judge is covered by the ADEA. This Court's precedent dictates that we defer to the EEOC's permissible interpretation of the ADEA.

n5 Because I conclude that the challenged Missouri constitutional provision violates the ADEA, I need not consider petitioners' alternative argument that the mandatory retirement provision violates the Fourteenth Amendment to the United States Constitution. See *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589-590, 113 L. Ed. 2d 622,*

111 S. Ct. 1522 (1991).

I dissent.